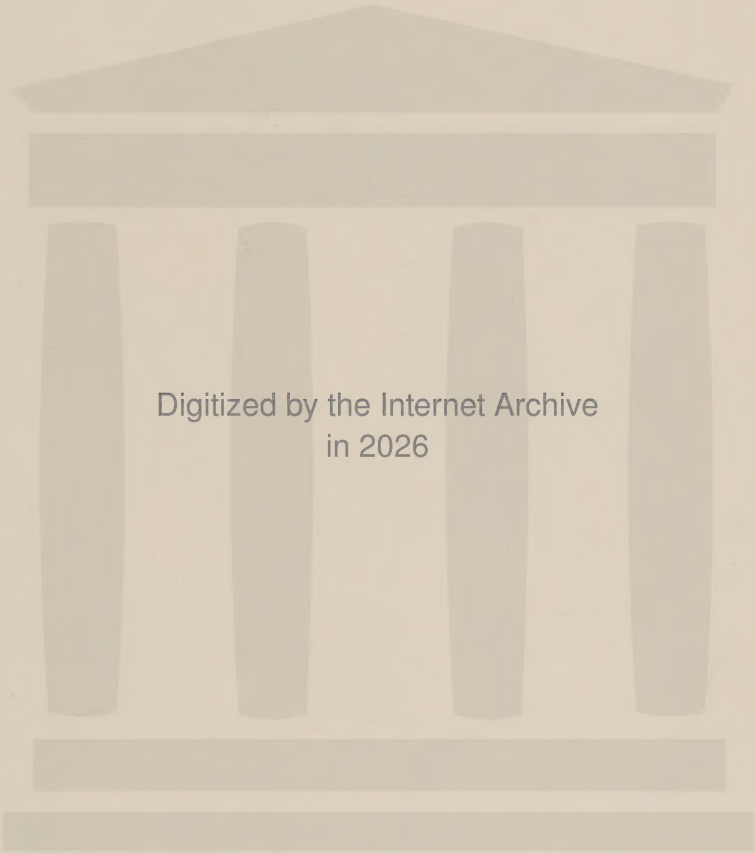
THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

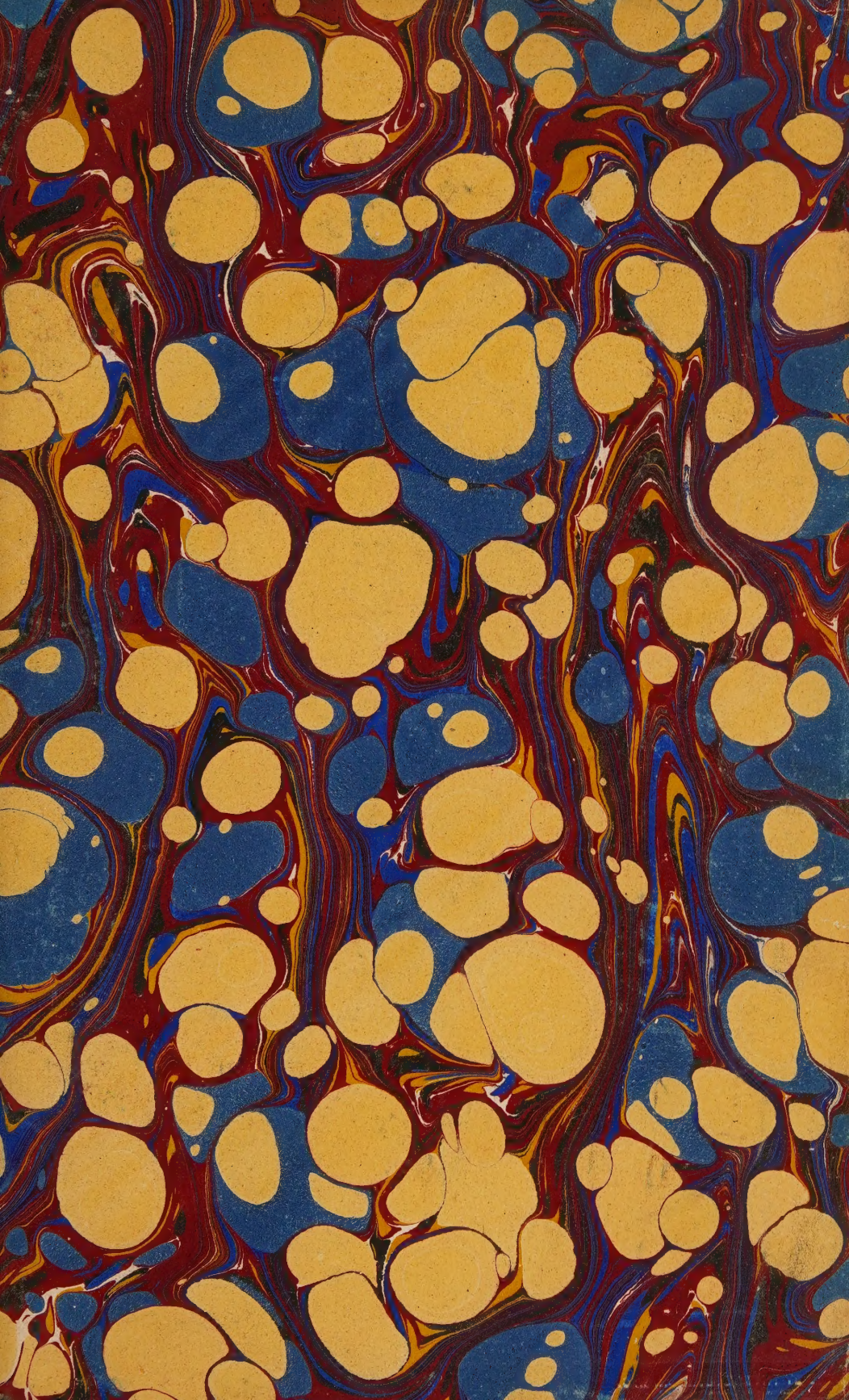
UNIVERSITY OF LONDON LIBRARY

346.4 Mx North Gallery

THE LIBRARY.


Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-family-division_1892



REFERENCE ONLY

346.4
Mx. North Gall.

OUND BY THYNNE, LONDON, W. C.

1892.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

Probate Division.

COURTS OF PROBATE, DIVORCE, AND ADMIRALTY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL;

ALSO DECISIONS IN THE

ECCLESIASTICAL COURTS.

EDITOR—A. P. STONE, BARRISTER-AT-LAW.

REPORTERS.

Court of Appeal	MARTIN WARE, H. CADMAN JONES, T. L. MEARS,	*Barristers-at-Law.*
Probate and Divorce	W. LEYCESTER,	*Barrister-at-Law.*
Admiralty Cases	T. L. MEARS,	*Barrister-at-Law.*
Ecclesiastical Cases	C. F. JEMMETT,	*Barrister-at-Law.*

1892.

LONDON:
Printed and Published for the Council of Law Reporting
BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 27, FLEET STREET, E.C.

BIBL. LONDIN UNIV.

JUDGES

OF

THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION

OF

THE HIGH COURT OF JUSTICE.

1892.

The Right Hon. Sir Charles Parker Butt, Knt., President.

The Right Hon. Sir Francis Henry Jeune, Knt., President.

The Hon. Sir John Gorell Barnes, Knt.

JUDGES

OF

THE COURT OF APPEAL.

1892.

Lord HALSBURY, Lord Chancellor.

Lord COLERIDGE, Lord Chief Justice of England.

Lord ESHER, Master of the Rolls.

Sir CHARLES PARKER BUTT, President of the Probate, Divorce and Admiralty Division.

Sir FRANCIS HENRY JEUNE, President of the Probate, Divorce and Admiralty Division.

Sir NATHANIEL LINDLEY,
Sir CHARLES S. C. BOWEN,
Sir EDWARD FRY,
Sir HENRY CHARLES LOPES,
Sir EDWARD E. KAY,
Sir ARCHIBALD LEVIN SMITH,

} Ordinary Judges of Court of Appeal.

ERRATUM.

Page	*Line*	*For*	*Read*
230	note (1)	1 P. & D.	Law Rep. 1 P. & D.

The Mode of Citation of the Volumes of the LAW REPORTS, commencing January 2, 1893, will be as follows:—

In the First Series,
[1893] 1 Ch. [1893] 2 Ch. [1893] 3 Ch.

In the Second Series,
[1893] 1 Q. B. [1893] 2 Q. B. [1893] P.

In the Third Series,
[1893] A. C.

TABLE OF CASES REPORTED

IN THIS VOLUME.

	PAGE
A.	
Alston, E. D., In the Goods of	142
Armstrong *v.* Armstrong	98
Ashton (George), In the Goods of	83
Atherton, In the Goods of	104
Attorney-General, Bain *v.*	217
——————, —— *v.* (C. A.)	261
B.	
Bain *v.* Attorney-General	217
—— *v.* —————— (C. A.)	261
Bernstein *v.* Bernstein	375
Blandford *v.* Blandford	148
Bonaparte *v.* Bonaparte	402
Boyer *v.* Bishop or Norwich	41
Briscoe, Nickalls *v.*	269
C.	
Capella, The	70
Carl XV., The	132
—————— (C. A.)	324
Clements, In the Goods of	254
Connemara *v.* Connemara	102
Cox, Hakes *v.*	110
D.	
Dictator, The	64
——————	304
Dixon, In re	386
Duke of Buccleuch, The (C. A.)	201
Duplany *v.* Duplany	53
Dwina, The	58
E.	
Eden, The	67
Everley (William), In the Goods of	50
F.	
Fuller, In the Goods of	377
G.	
Goodden *v.* Goodden (C. A.)	1
Gordon (Lady Isabella), In the Goods of	228
Goulder *v.* Goulder	240

	PAGE
Grange *v.* Grange	245
Green, Leigh *v.*	17
Greenwood (Thomas), In the Goods of	7
H.	
Hakes *v.* Cox	110
Hanbury *v.* Hanbury	222
Heath (G. Y.), In the Goods of	253
Highland Chief, The	76
Hipwell *v.* Hipwell	147
Hornet, The	361
J.	
J. R. Hinde, The	231
Jackson (W.), In the Goods of	257
Jaederen, The	351
K.	
Kate B. Jones, The	366
L.	
Leigh (James), In the Goods of	82
Leigh *v.* Green	17
Lemme, In the Goods of	89
Lepanto, The	122
Lewis *v.* Lewis	212
Ley (Mary), In the Goods of	6
M.	
M'Carthy, Mahoney *v.*	21
Mahoney *v.* M'Carthy	21
Merchant Prince, The	9
——— (C. A.)	179
Mersey Docks and Harbour Board, Turner *v.* (C. A.)	285
Midwinter *v.* Midwinter (C. A.)	28
Moore (George), In the Goods of	145
Moore (Sarah Sophia), In the Goods of	378
Moore *v.* Moore	382
N.	
N. Strong, The	105
Nickalls *v.* Briscoe	269
Nifa, The	411
Norwich (Bishop of), Boyer *v.*	41
——— O'Malley *v.*	175
O.	
O'Malley *v.* Bishop of Norwich	175
Ormerod, Paton *v.*	247
P.	
P. Caland, The (C. A.)	191
Parnell *v.* Wood (C. A.)	137
Paton *v.* Ormerod	247
R.	
Rich (A. G.), In the Goods of	143
Robin, The	95
Rourke, Thompson *v.* (C. A.)	244
Russell, In the Goods of	380
——— *v.* Russell (C. A.)	152
S.	
St. Botolph Without, Aldgate, The Vicar and one of the Churchwardens of *v.* The Parishioners of the Same	161
——— *v.* The Parishioners of the Same	173
St. Helen's, Bishopsgate, Rector, &c., of, with St. Mary Outwich *v.* The Parishioners of the Same	259
St. Mary-at-Hill, Rector, &c., of, with St. Andrew Hubbard *v.* Parishioners of Same	394
Saltburn, The	333
Schwan, The	419
Spenceley, In the Goods of	255
T.	
Taylor (William), In the Goods of	90

	PAGE
Thompson *v.* Rourke (C. A.)	244
Tonge *v.* Tonge	51
Turner *v.* Mersey Docks and Harbour Board (C. A.)	285

W.

Waddell *v.* Waddell	226
Walsh, In the Goods of	230
Wilhelm Tell, The	337
Wilkinson, In the Goods of	227
Wood, Parnell *v.* (C. A.)	137

Y.

Yarrow *v.* Yarrow	92

Z.

Zanzibar, The	233

TABLE OF CASES CITED.

A.

		PAGE
Afrika, The	5 P. D. 192	347, 348
Albert Edward, The	44 L. J. (Adm.) 49	289, 293
Alexandria, The	Law Rep. 3 A. & E. 574	289
Aline, The	1 Wm. Rob. 111	316, 318, 320
Anderson, In the Goods of	39 L. J. (P. & M.) 55	229
Andrews *v.* Ross	14 P. D. 15	408, 410, 411
Annot Lyle, The	11 P. D. 114	11, 189, 427, 431, 433, 434
Arnott *v.* Hayes	36 Ch. D. 731	139, 140
Asia, The	[1891] P. 121	335, 336
Attorney-General *v.* Corporation of Birmingham	15 Ch. D. 423	208, 210
——— *v.* Marquis of Stafford	3 Ves. 77	47

B.

Baylis, In the Goods of	Law Rep. 1 P. & D. 21	381
Beale *v.* Beale	Law Rep. 3 P. & D. 179	18, 20
Benlarig, The	14 P. D. 3	127, 129
Benmore, The	Law Rep. 4 A. & E. 132	11
Bent *v.* Bent	2 Sw. & Tr. 392	150
Benyon *v.* Benyon	1 P. D. 447	150
Beta, The	9 P. D. 134	107
Beulah, The	2 Notes of Cases, 61	347, 348
Bilbao, The	Lush. 149	294
Birt, In the Goods of	Law Rep. 2 P. & D. 214	8
Bjorkquist *v.* Certain Steel Rail Crop Ends	5 Hughes' Rep. 194	357
Blower's Trusts, In re	Law Rep. 6 Ch. 351	85, 87
Boddington *v.* Boddington	6 P. D. 13	215, 216
Bold Buccleugh, The	7 Moo. P. C. C. 267	308, 320
Bolina, The	3 Notes of Cases 208	432
Bond *v.* Bond	2 Sw. & Tr. 93	241
Bourget, In the Goods of	1 Curt. 591	144
Bradley *v.* Bradley	3 P. D. 47	2
Brinkley *v.* Attorney-General	15 P. D. 76	218
Brooke *v.* Kent	3 Moo. P. C. 334	8
Brown *v.* Wilkinson	15 M. & W. 391	314, 315
Buckhurst, The	6 P. D. 152	194
Burnell *v.* Jenkins	2 Phillim. 391	281
Burrell *v.* Simpson	4 Court Sess. Cas. 4th Series, 177	236
Butler *v.* Butler	15 P. D. 32; 126	156, 157, 159

C.

Camellia, The	9 P. D. 27	127
Carew *v.* Carew	[1891] P. 360	52

		PAGE
Cargill *v.* Cargill	1 Sw. & Tr. 235	23, 24, 26
Cargo ex Honor, The	Law Rep. 1 A. & E. 87	373
Carron Iron Co. *v.* McLaren	5 H. L. C. 416	99
Carswell *v.* Carswell	8 Court Sess. Cas. 4th Series, Rettie 901	408, 409
Cashmere, The	15 P. D. 121	68
Castlegate *v.* Dempsey	[1892] 1 Q. B. 854	356
Castrique *v.* Imrie	Law Rep. 4 H. L. 414	311
Chapman *v.* Day	48 L. T. (N.S.) 907	208
Charter *v.* Charter	Law Rep. 7 H. L. 364	84
Cheerful, The	11 P. D. 3	61
Chinery, Ex parte	12 Q. B. D. 342	210
Christiansborg, The	10 P. D. 141	308, 322
City of Chester, The	9 P. D. 182	345
City of Manchester, The	5 P. D. 221	287
Clara Killam, The	Law Rep. 3 A. & E. 161	291, 302
Cleare & Foster *v.* Cleare	Law Rep. 1 P. & D. 655	19
Clara, The	Sw. 1	313, 323
Clark *v.* Clark	31 L. J. (P. & M.) 32	52
Clarke *v.* Hart	6 H. L. C. 633	263
Clyde Navigation Company *v.* Barclay	1 App. Cas. 790	436
Collett, In the Goods of	Dea. & Sw. 274	228
Collins *v.* Collins	9 App. Cas. 241	383, 384
Cooke *v.* Cooke	2 Phillim. 40.	3
Coulthard, In the Goods of	11 Jur. (N.S.) 184	255
Covell *v.* Covell	Law Rep. 2 P. & D. 411	3, 5
Creadon, The	5 Asp. Mar. L. C. 585	425, 435, 439, 441
Crisp *v.* Martin	2 P. D. 15	281
Cunningham *v.* Dunn	3 C. P. D. 440	356
Curfew, The	(1891) P. 131	415, 417

D.

Dart *v.* Dart	3 Sw. & Tr. 208	2, 4
Davies *v.* Davies	36 Ch. D. 359	97
——— *v.* Mann	10 M. & W. 546	363
Deck *v.* Deck	2 Sw. & Tr. 90	241
Dent *v.* Dent	34 L. J. (P.M.) 118	384, 385
Doe *v.* Hiscocks	5 M. & W. 368	252
Dordogne, The	10 P. D. 6	107
Douglas, The	7 P. D. 151	291
Dundee, The	1 Hagg. Adm. 109	313, 315
Durant *v.* Durant	1 Hagg. Ecc. 733	384

E.

Eccles, In the Goods of	15 P. D. 1	50
Edward Hawkins, The	Lush. 515	128
Edwards *v.* Edwards	17 L. T. 584	52
Elysia, The	4 Asp. Mar. L. C. 540	107
Enchantress, The	Lush. 93	344, 346, 347, 348
E. U., The	1 Spks. 63	373
European, The	10 P. D. 99	13, 183
Evans *v.* Evans and Robinson	1 Sw. & Tr. 328	159
——— *v.* Knight and Moore	1 Add. Ecc. 229	19
——— *v.* Slack	38 L. J. (Ecc.) 38	279
Everard *v.* Kendall	Law Rep. 5 C. P. 428	289, 291
Excelsior, The	Law Rep. 2 A. & E. 268	289, 293, 302

PAGE

F.

Favorite, The	2 Wm. Rob. 255	373
Fischer *v.* Sztaray	27 L. J. (Q.B.) 239	99
Fitzgerald *v.* Fitzgerald	Law Rep. 1 P. & D. 694	23, 24, 25
Five Steel Barges	15 P. D. 142	308, 310
Flora, The	Law Rep. 1 A. & E. 45	309, 322
Flower *v.* Bradley	44 L. J. (Ex.) 1	294
——— *v.* Flower	Law Rep. 3 P. & D. 132	155, 156
Ford *v.* Cotesworth	Law Rep. 5 Q. B. 544	356
Forth *v.* Forth	36 L. J. (P. & M.) 122	2
Franconia, The	3 P. D. 164	238
Frederick *v.* Attorney-General	Law Rep. 3 P. & D. 270	263, 266
Freedom, The	Law Rep. 3 A. & E. 495	66, 308, 309, 321
Freir, The	2 Asp. Mar. L. C. 589	321
Fry, In the Goods of	1 Hagg. Ecc. 80	228
Furlonger *v.* Furlonger	5 Notes of Cases, 422	4

G.

Ganges, The	Law Rep. 2 A. & E. 370	344, 346, 348
Gaynor *v.* Gaynor	31 L. J. (P. & M.) 116	246
General Steam Navigation Company *v.* British and Colonial Steam Navigation Company	Law Rep. 4 Ex. 238	135
Gilbert *v.* Buzzard	2 Hagg. Cons. 333	393
Good *v.* Isaacs	[1892] 2 Q. B. 555	354
Grant *v.* Grant	Law Rep. 2 P. & D. 8; Law Rep. 5 C. P. 380, 727	84, 85, 86, 87
Green *v.* Procter and Newey	1 Hagg. Eccl. 337	19
Griffin *v.* Dighton	5 B. & S. 93	280
Griffiths *v.* London and St. Katharine Dock Company	13 Q. B. D. 259	66
Groves and Wright *v.* Vicar of Hornsey	1 Hagg. Cons. 188	281
Grundy, In the Goods of	1 P. & D. 459	230

H.

Hall *v.* Hall	[1891] P. 302	156, 160
Hammond *v.* Blake	10 B. & C. 424	135
Harris *v.* Jacobs	15 Q. B. D. 247	356
Hawke (Lord) *v.* Corri	2 Hagg. Cons. 280	245, 408
Hayton *v.* Irwin	5 C. P. D. 130	415, 416, 419
Heal *v.* Heal	Law Rep. 1 P. & D. 300	156, 158
Heard *v.* Borgwardt	W. N. [1883] 173	210
Henrich Björn, The	10 P. D. 44; 11 App. Cas. 270	293, 313
Herald, The	63 L. T. (N.S.) 324	336
Hero, The	Br. & L. 447.	309, 321, 323
———	[1891] P. 294	68, 69, 290
Hick *v.* Rodocanachi	[1891] 2 Q. B. 626	356
Hill *v.* Crook	Law Rep. 6 H. L. 265	87
Holman *v.* Wade	Times, May 11, 1877	414, 416, 419
Hope, The	1 Wm. Rob. 154	308, 309, 317, 319
Howard *v.* Beall	23 Q. B. D. 1	139
Hulse *v.* Hulse and Tavernor	Law Rep. 2 P. & D. 259	215

		PAGE
Hunt *v.* Hunt	8 P. D. 161	150
Hurley *v.* Hurley	[1891] P. 367	155

I.

Ilos, The	Sw. 100	209, 210
India, The	1 Wm. Rob. 406	128
Indus, The	12 P. D. 46	11, 14, 428, 431, 432, 433, 434
Industrie, The	Law Rep. 3 A. & E. 303	289, 292

J.

Joddrell, In re	44 Ch. D. 590; [1891] A. C. 304	84, 88
Johann Friederich, The	1 Wm. Rob. 35	320
Johannes, The	Law Rep. 3 A. & E. 127	66, 309, 323
John Dunn, The	1 Wm. Rob. 159	321
John McIntyre, The	6 P. D. 200	236
Johnson *v.* Shippen	2 Ld. Raym. 982	311
Jonge Bastiaan	5 C. Rob. 322	310, 322, 323
Julius *v.* Bishop of Oxford	5 App. Cas. 214	121

K.

Kalamazoo, The	15 Jur. 885	66, 308, 309, 318, 319, 321
Keats *v.* Keats	1 Sw. & Tr. 358	159
Keith *v.* Butcher	25 Ch. D. 750	208
Khedive, The	7 App. Cas. 795	314
Kirkman *v.* Kirkman	1 Hagg. Cons. 409	4

L.

Latham *v.* Latham and Gethin	30 L. J. (P. & M.) 163	215
Lawford *v.* Davies	4 P. D. 61	408
Leeman *v.* George & Rosser	Law Rep. 1 P. & D. 542	19
Lewis *v.* Lewis	2 Sw. & Tr. 394	214
Lishman *v.* Christie	19 Q. B. D. 333	415, 416
London (Corporation of) *v.* Attorney-General	1 H. L. C. 471	220
Long *v.* Crossley	13 Ch. D. 388	207
Louisa, The	2 Wm. Rob. 22	344, 346, 347

M.

McHenry *v.* Lewis	22 Ch. D. 397	99
Maidman *v.* Malpas	1 Hagg. Cons. 205	281
Mallinson *v.* Mallinson	Law Rep. 1 P. & D. 221	149
Malvina, The	Lush. 493	289, 302
March *v.* March and Palumbo	Law Rep. 1 P. & D. 440	150
Maria, The	1 Wm. Rob. 95	327
Marpesia, The	Law Rep. 4 P. C. 212	190, 432, 433, 434
Matthew *v.* Matthew	19 L. T. 662	23, 27
Mayer, In the Goods of	Law Rep. 3 P. & D. 39	146

		PAGE
Melpomene, The	Law Rep. 4 A. & E. 129	373
Merrill *v.* Morton	17 Ch. D. 382	85, 87, 88
Mews *v.* Reg.	8 App. Cas. 353	219
Milanese, The	4 Asp. Mar. L. C. 318	107
Miles *v.* Chilton	1 Rob. 684	408, 410
Minna, The	Law Rep. 2 A. & E. 97	210
Miriam, The	2 Asp. M. L. C. (N.S.) 259	309, 321
Moore *v.* Smith	28 L. J. (M.C.) 126	219
Morgan *v.* Morgan	2 Curt. Ecc. 679	54
Mudge *v.* Adams	6 P. D. 54	23, 24
Munday *v.* The Mary	Burrell's Admiralty Cases, 284	301
Munster *v.* Cox	10 App. Cas. 680	208

N.

Niboyet *v.* Niboyet	4 P. D. 1	241
Noble *v.* Noble and Godman	Law Rep. 1 P. & D. 691	383
Norris *v.* Norris, Lawson, and Mason	4 Sw. & Tr. 237	376
Nostra Senora del Carmine, The	1 Spks. 303	66

O.

Onslow *v.* Commissioners of Inland Revenue	25 Q. B. D. 465	210
Orient, The	Law Rep. 3 P. C. 696	308, 323
Oswald, In the Goods of	Law Rep. 3 P. & D. 162	380
Otter, The	Law Rep. 4 A. & E. 203	11
Otway *v.* Otway	13 P. D. 141	54, 55, 56
Ousey *v.* Ousey and Atkinson	1 P. D. 56	214, 215, 216

P.

Palermo, The	10 P. D. 21	238, 239
Parlement Belge, The	5 P. D. 197	320
Parr (T.), In the Goods of	29 L. J. (P. & M.) 70	8
Peek *v.* Trover	7 P. D. 21	271, 279, 280, 283
Perry *v.* Dyke	1 Sw. & Tr. 12	144
Peruvian Guana Company *v.* Bockwoldt	23 Ch. D. 225	99, 101
Phillip *v.* Phillip	21 W. R. 392	2
Phillips *v.* Homfray	24 Ch. D. 439	209
Pitt *v.* Pitt	4 Macq. 627	407, 409
Pomero *v.* Pomero and Hadley	10 P. D. 174	376, 377
Ponsonby *v.* Ponsonby	9 P. D. 58, 122	148
Postlethwaite *v.* Freeland	5 App. Cas. 599	355, 359
Prichard *v.* Prichard	3 Sw. & Tr. 523	2, 4
Pride of Canada, The	Br. & L. 208	344, 346, 348
Purissima Concepcion, The	3 Wm. Rob. 181	373
Purkis *v.* Flower	Law Rep. 9 Q. B. 114	293
Pyman *v.* Dreyfus	24 Q. B. D. 152	354

R.

Rajah, The	Law Rep. 3 A. & E. 539	435
Randall *v.* Lynch	2 Camp. 352	354
Reg. *v.* City of London Court, Judge of	[1892] 1 Q. B. 273	288, 292, 293, 297, 299, 303

		PAGE
Reg. *v.* Howes	30 L. J. (M. C.) 47	149
—— *v.* Leresche	[1891] 2 Q. B. 418	23
—— *v.* Price	12 Q. B. D. 247	388, 390
—— *v.* Stephenson	13 Q. B. D. 331	388
—— *v.* Stewart	12 A. & E. 773	393
Rice (Catherine), In the Goods of	5 Ir. Eq. 176	378
Rich *v.* Bushnell	4 Hagg. Eccl. 164	280, 281
Ritchings *v.* Cordingley	Law Rep. 3 A. & E. 113	398
Robert Pow, The	Br. & L. 99	291
Robertson *v.* Robertson	6 P. D. 119	155, 156, 158, 159
Rockett *v.* Clippingdale	[1891] 2 Q. B. 293	335, 336
Rosario, The	2 P. D. 41	344, 346
Rowe *v.* Rowe	4 Sw. & Tr. 162	54
Ruby, The	18 P. D. 139	137
Ruby Queen, The	Lush, 266	311
Ryder *v.* Ryder	30 L. J. (P. & M.) 44	149, 150

S.

Salaman *v.* Warner	[1891] 1 Q. B. 734	210
Sarah, The	Lush, 549	293, 301
Scotia, The	6 Asp. Mar. L. C. 541	362, 363, 365
Scrutton *v.* Childs	3 Asp. Mar. L. C. 373	414, 415, 416, 417, 418, 419
Shaw *v.* Gould	Law Rep. 3 H. L. 55	408, 409
Sherley *v.* Underhill	Moore, 894	47
Sherratt *v.* Mountford	Law Rep. 8 Ch. 928	85, 87
Sindbad, The	4 Times L. R. 170	232
Sinquasi, The	5 P. D. 241	289
Sisters, The	1 P. D. 117	289
Smith *v.* Lidiard	3 K. & J. 252	85, 88
—— *v.* Smith	7 P. D. 84	155, 156, 157, 159
Staffordshire, The	Law Rep. 4 P. C. 194	308, 322
Stavert *v.* Stavert	9 Court Sess. Cas. 4th Series, Rettie, 519	408, 409
Stettin, The	Br. & Lush, 199	135
Strong, In re	31 Ch. D. 273	177
Sullivan *v.* Sullivan	2 Add. 299	54
Summerell *v.* Clements	3 Sw. & Tr. 35	19
Sylph, The	Law Rep. 2 A. & E. 24	289

T.

Tapscott *v.* Balfour	Law Rep. 8 C. P. 46	354
Temiscouata, The	2 Spinks, 208	318, 321
Tharsis Sulphur and Copper Company *v.* Morel	[1891] 2 Q. B. 647	354
Triune, The	3 Hagg. Adm. 114	315, 317

U.

Uhla, The	Law Rep. A. & E. 29	289, 293, 302
Umbilo, The	[1891] P. 118	235, 238
Undaunted, The	Lush. 90	373
Urania, The	10 W. R. 97	289
Urquhart & Waterman *v.* Fricker	3 Add. Ecc. 57	19

		PAGE
Victor, The	Lush. 72	319
Virgil, The	2 Wm. Rob. 201	432
Virgo, The	3 Asp. Mar. L. C. 285	13
Volant, The	1 Wm. Rob. 383	291, 308, 309, 315, 317, 318, 320, 321

W.

Walcott *v.* Lyons	29 Ch. D. 584	207
Walsh *v.* Bishop of Lincoln	Law Rep. 10 C. P. 518	46
Waring *v.* Waring	2 Phillim. 132	4
Warkworth, The	9 P. D. 20	13
Watts *v.* Watts	12 Court Sess. Cas. 4th Series, Rettie, 894	408, 409
Webster *v.* Webster	31 L. J. (P. & M.) 184	149
Wedderburn *v.* Wedderburn	2 Beav. 208	99
Wells *v.* Wells	Law Rep. 18 Eq. 504	85, 86, 88
White *v.* White	1 Sw. & Tr. 591	2, 4
Wild Ranger, The	Br. & L. 84	66, 309, 321
Williamina, The	3 P. D. 97	335
Williams, In the Goods of	3 Hagg. Ecc. 217	146
——— *v.* Williams	20 Ch. D. 659	390
Wilson *v.* Wilson	Law Rep. 2 P. & D. 353	246
Wing *v.* Angrave	8 H. L. C. 183	143
Wolverton Mortgaged Estates, In re	7 Ch. D. 197	84, 85, 87
Wyatt *v.* Rosherville, &c., Co.	2 Times Rep. 282	66
Wyllie *v.* Harrison	23 Sc. L. Rep. 62	355

Y.

Yan-Yean, The	8 P. D. 147	73
Yorkshireman, The	Shipping Gazette, March 10, 1891	135

Z.

Zephyr, The	11 L. T. (N.S.) 351	309, 318, 320, 323
Zeta, The	[1891] P. 216: [1892] P. 285	336

CASES

DETERMINED BY THE

PROBATE DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

1891. 1892.

[IN THE COURT OF APPEAL.]

1891
Oct. 27;
Nov. 6.

GOODDEN *v.* GOODDEN.

Divorce—Alimony—Judicial Separation on ground of Wife's Cruelty—20 & 21 Vict. c. 85, s. 17.

The Ecclesiastical Courts had power to grant permanent alimony to a wife who was divorced a mensâ et thoro on account of her misconduct, and that power is not taken away from the Divorce Court by the 20 & 21 Vict. c. 85, s. 17. The Court therefore has now jurisdiction to grant permanent alimony to a wife against whom a decree of judicial separation has been made on account of her misconduct, and has also the power from time to time to vary such order.

Decision of Jeune, J. ([1891] P. 395) affirmed.

APPEAL from a decision of Jeune, J. (1)

The facts were shortly as follows. A petition for judicial separation was presented by a husband on the ground of the cruelty of his wife.

The action was tried on June 12, 1890, and a decree for judicial separation was pronounced, the custody of the three elder

(1) [1891] P. 395.

C. A. 1891

GOODDEN v. GODDEN.

children being given to the petitioner and the custody of the youngest to the mother.

On June 18, 1890, an agreement was signed by the petitioner and respondent whereby it was agreed that the petitioner should pay the respondent 2*l*. a week by way of permanent alimony, having regard to the then means and position of the petitioner, and it was expressly stipulated that the agreement should not act as an estoppel or in any way operate to the prejudice of either of the parties in any application which might be made for a variation in the amount of the allowance.

In September, 1890, the husband, under the will of his uncle, became entitled to an estate of considerable value; and on June 6, 1891, the wife filed her petition for an allotment of permanent alimony.

The husband took out a summons to dismiss the petition, on the ground that the Court had no jurisdiction to decree permanent alimony to the wife under the circumstances; and the registrar dismissed the wife's petition. The wife then appealed to the Court, and Jeune, J., allowed the appeal, and directed that the question of the amount of the allowance should be referred back to the registrar.

The husband appealed from this decision.

R. H. Pritchard (*Inderwick, Q.C.*, with him), for the appellant, referred to the statute 20 & 21 Vict. c. 85, ss. 17, 24, 32, and *White* v. *White* (1); *Dart* v. *Dart* (2), and Rules of Divorce Court, rule 92.

Priestley, for the wife, cited *Prichard* v. *Prichard* (3); *Forth* v. *Forth* (4); *Phillip* v. *Phillip* (5); *Bradley* v. *Bradley*. (6)

R. H. Pritchard, in reply.

Cur. adv. vult.

1891. Nov. 6. KAY, L.J., delivered the judgment of the Court, (Lindley, Bowen, and Kay, L.JJ.), as follows:—

The question upon this appeal is as to the jurisdiction of the Divorce Court to grant permanent alimony to the wife after a

(1) 1 Sw. & Tr. 591.
(2) 3 Sw. & Tr. 208.
(3) 3 Sw. & Tr. 523.
(4) 36 L. J. (P. & M.) 122.
(5) 21 W. R. 392.
(6) 3 P. D. 47.

decree for judicial separation on account of the cruelty of the wife. If the decree had been founded upon misconduct of the husband, it is conceded that such a grant could have been made. It would be strange if there were jurisdiction in the one case and not in the other. It may not have been customary to grant it to a wife who was in fault, but to say that there is no jurisdiction to do so seems unreasonable. A case was put during the argument by Bowen, L.J., of a husband who, by the marriage settlement, was entitled during his life to all the income of the wife's property. Can it possibly be the law that the wife must be left totally unprovided for under such circumstances because the Court has no jurisdiction to make a provision for her even out of that which before the marriage was her own property? The question depends upon the several statutes under which the present Divorce Court was founded. But in construing them, regard must be had to the jurisdiction existing before they were passed. Unless there is something in them expressly taking away powers before exercised by the Ecclesiastical Courts, we should be reluctant to hold that the Divorce Court has a more limited authority than they had. In the first Act, by which the Divorce Court is constituted, 20 & 21 Vict. c. 85, s. 22, it is provided that "in all suits and proceedings other than proceedings to dissolve any marriage, the said Court shall proceed and act and give relief on principles and rules which, in the opinion of the said Court, shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained, and to the rules and orders under this Act." Lord Penzance decided in *Covell* v. *Covell* (1) that the Divorce Court could, after a decree for judicial separation, entertain a petition for alimony, and he founded his judgment upon the previous practice in that respect of the Ecclesiastical Courts in cases of divorce a mensâ et thoro, citing *Cooke* v. *Cooke* (2) as a case in which this was done. There seems to be no decision that this might not have been done by the Ecclesiastical Courts when the separation was decreed on account of the misconduct of the wife. In the text books and

(1) Law Rep. 2 P. & D. 411. (2) 2 Phillim. 40.

C. A. 1891 GOODDEN v. GOODDEN. Kay, L.J.

digests there are mentioned two cases of applications to the Ecclesiastical Court for divorce a mensâ et thoro, on account of the cruelty of the wife: *Kirkman* v. *Kirkman* (1), and *Furlonger* v. *Furlonger* (2). These are referred to by counsel in *White* v. *White* (3) as the only reported cases. But it seems always to have been competent for the husband to obtain a divorce a mensâ et thoro on this ground: *Waring* v. *Waring* (4). In one of these cases the divorce was granted, but there was not any application for alimony. The granting or refusing of alimony after a divorce a mensâ et thoro seems to have been a matter upon which the Ecclesiastical Courts exercised a large discretion. It appears to have been their practice not to grant alimony to a wife divorced a mensâ et thoro, on the ground of her adultery, but no doubt is thrown upon the jurisdiction of the Court to do so: see *White* v. *White.* (3) In applications to Parliament for a divorce a vinculo matrimonii, it was usual to insert in the Bill a provision for permanent alimony to the wife, although the divorce was sought on the ground of her adultery; and such alimony, it is said, was usually granted when the wife brought a fortune to the husband. (Macqueen's Practice of the House of Lords, 537). Under the new law three cases have occurred: *White* v. *White* (3), and *Dart* v. *Dart* (5), in both of which alimony was refused, in the latter the Judge Ordinary expressing his opinion that he had no jurisdiction to grant alimony in such a case. However, in *Prichard* v. *Prichard* (6), the Judge Ordinary refused to follow those decisions and granted alimony, saying that if there were no precedent he ought to make one. The argument against the jurisdiction was not founded upon any words in the statute expressly negativing it. There are no such words. It was rested chiefly upon s. 17 of 20 & 21 Vict. c. 85, which provides that application for judicial separation may be made by either husband or wife, and the Court may decree judicial separation accordingly, "and where the application is by the wife may make any order for alimony which shall be deemed just." That seems to contemplate an

(1) 1 Hagg. Const. 409.
(2) 5 Notes of Cases, 422.
(3) 1 Sw. & Tr. 591.
(4) 2 Phillim. 132.
(5) 3 Sw. & Tr. 208.
(6) 3 Sw. & Tr. 523.

order for alimony in the decree itself, when such decree was made upon the wife's application. In such a case all the facts would probably be before the Court at the original hearing, whereas, if the decree was upon the suit of the husband, the wife must make a separate application for alimony, which the husband would not be likely to make for her. It would be giving extraordinary and unnatural force to the language of s. 17 to say that it takes away or even negatives the jurisdiction of the Court to grant alimony where the decree for separation is made at the suit of the husband, and, in our opinion, that is not the true effect of the provision. Section 32, which refers to alimony and prescribes the mode of granting it, has been treated as referring to a decree for dissolution of marriage only: see per Lord Penzance in *Covell* v. *Covell.* (1) Jurisdiction to make such a decree was given for the first time by the statute, and it was necessary to give jurisdiction also to grant alimony in such cases; and that may have been the sole object of this section. But this would leave unaffected the power of granting alimony in a case of judicial separation if the Ecclesiastical Courts had such power. On the whole, we see no reason to doubt that the Ecclesiastical Court had jurisdiction to grant permanent alimony in a case like the present, and we cannot construe the recent Divorce Act as depriving the Divorce Court of a like jurisdiction. Our opinion, therefore, is that the Divorce Court has jurisdiction in this case to grant permanent alimony if it shall seem fit to do so. Whether it will be proper to make such a grant is not now to be determined, as the reference upon the subject is general, and has to be considered before that can be decided. The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for appellant: *Darley & Cumberland.*
Solicitors for respondent: *G. J Vanderpump & Son.*

(1) Law Rep. 2 P. & D. 411.

M. W.

1891
Nov. 10.

In the Goods of MARY LEY.

Probate—Administration with Will annexed—Executrix and Sole Legatee not to be found—Grant to Representative of Next of Kin of Testatrix.

Where a sole executrix and legatee—being the illegitimate daughter of the testatrix—had not been heard of for forty years, the Court granted administration with the will annexed to the representative of the next of kin of the testatrix, on proof that the executrix had been cited by advertisement and that the Solicitor to the Treasury did not intend to apply for administration to her estate, and subject to administration to the next of kin being taken out.

Application for administration with the will annexed.

Mary Ley, late of Tiverton in the county of Devon, deceased, died May 25, 1864, leaving a will dated July 26, 1842, by which she appointed her illegitimate daughter Jane Handford her sole executrix and universal legatee. Jane Handford was supposed to have entered the service of a family in Bristol, about the year 1851 or 1852, and to have gone abroad with them, and she had not been heard of since, either by her mother in her lifetime or by any of her relatives afterwards. The sole next of kin of Mary Ley at the time of her death was her sister, Sarah King, who died November 10, 1866, leaving three daughters—Mrs. Elizabeth Perry, widow; Mrs. Mary Candy, a widow; and Mrs. Caroline Row.

A sum of 271*l.* 8*s.* 5*d.* was in the Devon and Exeter Bank to the credit of the testatrix, besides 120*l.* Consols to which she was entitled. As it had become necessary to obtain a personal representative to her estate, Mrs. Perry agreed to take the grant, and on September 12, 1891, a citation was extracted calling on Jane Handford to accept or refuse probate and execution of Mary Ley's will, or to shew cause why letters of administration with the will annexed should not be granted to Mrs. Perry, the lawful niece and one of the persons entitled in distribution to the personal estate of the testatrix.

This citation, by direction of the registrar, was advertised in various newspapers, but no appearance had been entered to the citation.

Before the citation was issued the facts had been laid before

the Solicitor to the Treasury, who had informed the solicitor of the applicant that it was not his intention to apply for administration on behalf of the Crown to the estate of Jane Handford. 1891 IN THE GOODS OF LEY.

Searle, moved, with the consent of the other two nieces, that letters of administration with the will annexed be granted to Mrs. Perry.

THE COURT made the grant as prayed, subject to Mrs. Perry taking out letters of administration to her mother.

Solicitors: *Palmer, Eland, & Nettleship.*

W. L.

IN THE GOODS OF THOMAS GREENWOOD. *Dec.* 1.

Probate—Will—Nomination of Executors written after Attestation Clause—Erasure after Execution—Substituted Executor and Attesting Witness.

A will contained no nomination of executors in the body of it, but at the bottom, below the attestation clause, were the words, "executors, W. G. and C. S." There was an asterisk before these words and an asterisk before the word "executor" wherever it occurred in the will. It was proved that these words were written before the execution of the will. After the execution, the testator directed the name of C. S., who was an attesting witness as well as executor, to be erased and the name of W. S. to be written over the erasure. The will was not re-executed after these alterations had been made:—

Held, that the nomination of executors might be included in the probate, but that the name of C. S. must be restored both as executor and attesting witness.

APPLICATION for probate.

Thomas Greenwood, late of Todmorden, in the West Riding of Yorkshire, died leaving a will duly executed, bearing date May 20, 1889. In the will there were several references to and directions to "my executors herein named," and the word "executor," wherever it occurred, was always preceded by an asterisk. No executors, however, were named in the body of the will, but at the bottom of the will, and after the testator's signature and the attestation clause, were the words, preceded by an asterisk, "Executors, William Greenwood, William Sutcliffe." The last name was written on an erasure, through which could be distinctly traced the name "Charles Stansfield." The attesting witnesses were William Greenwood and Charles Stansfield, but

1891

IN THE GOODS OF GREENWOOD.

in like manner the name of Charles Stansfield had been scratched out, and the name of William Sutcliffe written over it.

There was evidence that the words "executors, William Greenwood, Charles Stansfield" were written on the will before the execution, and as to the erasures, it appeared from the affidavits that the testator had changed his mind as to Charles Stansfield, and one day, having called Sutcliffe into his house, asked him to scratch Stansfield's name out with a knife in the two places where it occurred, and write his own name instead. This was accordingly done, but the will was not afterwards re-executed.

R. H. Pritchard, with the consent of all parties interested, moved for probate of the will as it appeared before the erasures and substitutions. *In the Goods of Birt* (1) is an authority for admitting to probate words written after the attestation clause if they were written before the execution of the will. The asterisk shews where they were intended to be brought into the will, and they may be treated as an interlineation. As to the substituted names, the will not having been re-executed, the Court must grant probate of the will in its original condition: *Brooke* v. *Kent* (2), *In the Goods of T. Parr.* (3)

JEUNE, J. As the words nominating executors, though they appear after the signatures, were written before execution, they will be included in the probate. But as the erasures and subsequent substitution of names are not attested, and as the will was not re-executed afterwards, the name of Charles Stansfield must be restored both as an executor and an attesting witness. Probate will be granted to William Greenwood, power being reserved to Charles Stansfield to come in and prove hereafter.

Solicitor: *W. J. Harvey.*

(1) Law Rep. 2 P. & D. 214. (2) 3 Moo. P. C. 334.
(3) 29 L. J. (P. & M.) 70.

W. L.

THE MERCHANT PRINCE.

1891
Nov. 10, 11.

Admiralty—Collision—Vessel at Anchor—Inevitable Accident—Steam Steering Gear—Latent Defect—Reasonable Care and Skill—Burden of Proof—Practice—Evidence of Negligence.

In an action of damage by collision, the plaintiffs, in their statement of claim, in substance alleged that their vessel was at anchor, when the defendants' steamer ran into her in broad daylight.

The defendants, in their pleading, made no charge of negligence against the plaintiffs, but alleged that the collision was caused by the steering gear of their vessel not acting in consequence of some latent defect or obstruction, which could not have been ascertained or prevented by the exercise of any reasonable care or skill on their part, and that the collision and damage were caused by inevitable accident:—

Held, that the onus to disprove negligence lay on the defendants, and, therefore, that they must begin.

At the hearing, the defendants proved that the steam steering gear used was good of its kind, that it had been tried before the vessel left her anchorage to proceed on her voyage, that it was found to be in good order, that it had not previously failed to act, and that the cause of the defect in the machine, or obstruction in the working, could not be discovered by competent persons:

Held, that the defendants were not liable to the plaintiffs for the damages occasioned by the collision, as they had satisfied the onus of proof cast upon them to disprove negligence, and were not bound to go further and shew what was the cause of the defect or obstruction.

ACTION of damage by collision.

The plaintiffs were the owners of the steamship *Catalonia*, the defendants were the owners of the steamship *Merchant Prince*.

The material portion of the statement of claim was as follows:—

Par. 2: "Shortly before 10.30 A.M. on March 4, 1891, the *Catalonia*, a screw steamship of 3093 tons register, belonging to the port of Liverpool, and owned by the Cunard Steamship Company, Limited, was at anchor in the Cunard anchorage ground in the Mersey, a little to the south of Tranmere Ferry, and well over on the west side of the river, having on board a part cargo of general goods. The wind was from the N.W. or N.W. by W. and blowing a fresh breeze, and the weather was clear. It was nearly low water and the tide almost slack. The *Catalonia* was laying to her port anchor and heading about W. to W.S.W. A proper watch was being kept on board of her."

1891

THE MERCHANT PRINCE.

Par. 3: "In these circumstances the *Catalonia* saw a steamship (which proved to be the *Merchant Prince*) coming down the river from the southward on their port side, and she kept on towards the *Catalonia* until within about two or three ship's lengths off the *Catalonia*, and bearing about abeam, when she was hailed to keep clear of the *Catalonia*, but instead of doing so, as she could and ought to have done, she came on at a high rate of speed, and with her stem struck the port quarter of the *Catalonia* a heavy blow, doing her very considerable damage."

The defence, so far as material, was as follows:—

Par. 2: "Shortly after 10.30 A.M. on March 4, 1891, the *Merchant Prince*, a screw steamer of 1074 tons net register, was proceeding down the river Mersey, making about three knots an hour, on a voyage to the West Coast of Africa, with a general cargo, manned by a crew of twenty-six hands all told, and in charge of a duly licensed pilot. The wind was from the W.S.W., blowing a fresh gale, and the weather was clear. It was low water, and the tide was slack. A good look-out was being kept on board the *Merchant Prince*."

Par. 3: "In these circumstances those on board the *Merchant Prince* observed a steamship, which afterwards proved to be the *Catalonia*, about a mile distant, and about half a point on the port bow of the *Merchant Prince*. As the *Merchant Prince* approached the *Catalonia* the pilot ordered the helm of the *Merchant Prince* to be ported, and shortly afterwards to be hard aported, but it was found, on trying to get the wheel over to port that the steering gear would not act, and although the engines of the *Merchant Prince* were at once put full speed astern, she came into collision with the *Catalonia*, the stem of the *Merchant Prince* striking the port quarter of the *Catalonia*."

Par. 4: "The steering gear of the *Merchant Prince* had been tried before she left her anchorage to proceed on the said voyage, and was found to be in good order, and it failed to act as hereinbefore mentioned in consequence of some latent defect or obstruction which could not have been ascertained or prevented by the exercise of any reasonable care or skill on the part of the defendants or their servants, and the said collision and damage were caused by inevitable accident."

Nov. 10. On the case coming on for hearing,

1891

THE MERCHANT PRINCE.

Sir Walter Phillimore, and *J. P. Aspinall*, for the plaintiffs, submitted that, on the allegations in the defence above set out, the burden of proof was shifted, and that the defendants must begin: *The Annot Lyle* (1); *The Indus.* (2)

Myburgh, Q.C., and *A. D. Bateson*, (*Joseph Walton*, with them), for the defendants, contended that, according to the practice in Admiralty, in all cases of damage by collision the plaintiffs begin. The onus of proof is upon them to make out a primâ facie case of negligence on the part of the defendants. The defence here, in substance, is inevitable accident, and on the decided cases it lies upon the plaintiffs to begin: *The Benmore* (3); *The Otter.* (4)

[THE PRESIDENT (SIR CHARLES BUTT). It is admitted in the pleadings that the defendants' steamer in broad daylight ran into the plaintiffs' vessel at anchor. This raises a primâ facie presumption of negligence, which it lies on the defendants to rebut. The burden of proof is shifted and the defendants must begin.]

From the evidence it appeared that the steam steering gear in question was Davis' patent. It had been supplied to a number of vessels belonging to the defendants. It had been in use on board the *Merchant Prince* for some years, and had been found to work well, having never previously gone wrong. Owing to an accident, part of it had recently been renewed, but before the vessel's departure the whole of the gear had been examined and tested both under steam and by hand, and pronounced in good order. In the river, prior to the accident, it had been necessary to port and starboard the helm, but no difficulty had been experienced.

At the time the *Merchant Prince* was proceeding down the Mersey there was a moderate gale blowing from the westward, and it being slack water, the *Catalonia* was lying wind-rode partly athwart the river. Owing to the force of the wind the defendants' vessel griped a little as she approached the *Catalonia*, and her head came over somewhat to port. The pilot thereupon

(1) 11 P. D. 114.
(2) 12 P. D. 46.
(3) Law Rep. 4 A. & E. 132.
(4) Law Rep. 4 A. & E. 203.

1891

THE MERCHANT PRINCE.

gave the order port, and then hard a-port, to clear the stern of the *Catalonia*, but the third officer, after trying to get the wheel over, called out that it was jammed. The engines were then put astern, but the vessels were too close for the collision to be avoided.

It further appeared that owing to part of the chain running between the wheel and the rudder being new, it had a tendency to stretch, and in the Mersey, before and after the collision, it had been tightened as occasion required. Subsequently, on the West Coast of Africa, some links of the chain had been taken out and the vessel had got aground there through the jamming of the wheel, but a careful examination by competent persons had failed to discover the cause of the jamming. (1)

Nov. 11. *Myburgh, Q.C.*, and *A. D. Bateson*, (*Joseph Walton* with them), for the defendants. The plaintiffs have failed to make out any case of negligence against the defendants, but assuming that the onus has been properly thrown upon the defendants to disprove negligence, then it is submitted that the defendants have succeeded in doing so. They have proved that the *Merchant Prince* was in an efficient state to go to sea, that she was well found, well fitted, well manned, well officered, and well manœuvred, and that in all respects the defendants and their servants discharged the duty incumbent upon them. There is distinct evidence that the servants of the defendants were careful and alive to their duties as the whole of the gear was examined and tested by competent persons before the vessel's departure, and after she was in the Mersey the slack of the chain was taken in, as it was known that being new it was likely to stretch. It is in evidence that the chain was subsequently tightened on several occasions, but this was because the chain rattled and the rudder kicked, and not on account of jamming. The cause of the collision was inaction of the wheel at the critical moment.

(1) A good deal of evidence was gone into, as to whether the valve admitting the steam to the steering gear could have been inadvertently closed, and as to an interview between the overlooker of the defendants, and the pilot of the vessel, in which it was alleged, an attempt was made by the former to tamper with the evidence, but as the Court held that these matters had no bearing on the question, the evidence is omitted from the report.

1891

THE MERCHANT PRINCE.

No doubt, had the defendants bought in the market an inefficient machine they would be liable, but the inaction occurred for the first time in their experience of a well-known apparatus, admitted by the plaintiffs to be a very good kind of gear. No machine is absolutely perfect, there must always be a point where it will fail, and the defendants can only be made liable if they have been negligent in respect of its use. They have done their best and made every effort to ascertain the cause of the jamming. It is a case of a latent defect not discoverable, and as the competent persons who have been examined are unable to assign any reason for the inaction, the defendants cannot be called upon to go further and wander into conjecture and theory.

Sir Walter Phillimore, and *J. P. Aspinall*, for the plaintiffs. The defendants have not discharged the onus of proof. It lay upon them, in the events which have happened, to shew that they were not negligent in the management of their ship. Admitting that the patent is a good one, it does not follow that the particular apparatus on board the ship was efficient for its purpose, and it is a mistake to say that the accident was due to a latent defect. In *The Virgo* (1) the collision was held to be an inevitable accident, because it was proved that there was a latent defect in the metal, in consequence of which part of the steering gear broke, but here the failure to act at the critical moment was due to jamming. If the gear is manifestly insufficient, the defence of inevitable accident cannot be sustained. *The Warkworth* (2), and the amount of tightening which the evidence shews the chain required, is not consistent with any reasonable amount of stretching, and indicates inefficiency with consequent negligence on the part of the defendants. The defendants cannot be heard to say that the machine worked perfectly before and after, but that on the particular occasion it failed. The machine ought to have been so perfect that it could not jam, or if the machine is liable to go wrong in this way, the defendants should not have used it in a crowded river. In *The European* (3) the accident to the steam steering gear had

(1) 3 Asp. M. L. C. 285.
(2) Reported on the question of limitation of liability: 9 P. D. 20; and on appeal, ibid. 145.
(3) 10 P. D. 99.

1891

THE MERCHANT PRINCE.

happened before and the defendants were held liable. To escape liability the defendants must shew what the defect or obstruction was, for in *The Indus* (1) it was held, on appeal, that the primâ facie case of negligence against the steamship had not been displaced by the suggestion that because the collision might have been caused by the steam steering gear failing to act, the evidence was consistent with inevitable accident. All the cases shew that the onus of proof lies on the defendants, and they are bound to put their finger upon the cause of this accident and satisfy the Court on that point.

Myburgh, Q.C., in reply.

THE PRESIDENT (SIR CHARLES BUTT). This is a case of a vessel at anchor in the Mersey being run into by a steamer. In such circumstances one is not predisposed towards the defence set up of inevitable accident. It is necessary to consider the evidence given on the one side and the other, but as to the law it appears to me to be clear enough. The *Catalonia* having been at anchor, and the *Merchant Prince* having run into her in broad daylight, the onus of proving negligence, which is ordinarily on the plaintiff, is, on the admission of facts in the pleadings, shifted. The admitted facts cast the onus of proving that there was no negligence on their part on the defendants. The question is, have the defendants satisfied that onus? Now, at the outset of the case, it naturally occurred to me and to the Trinity Brethren as a possibility that the story of the jamming of this steam steering gear was not true, and that it was a mere excuse set up by the defendants for the negligent navigation of those in charge of their vessel. As a matter of fact, one of the expert witnesses says that having examined the machinery some time after the collision, and knowing what he does, he does not believe now that the wheel jammed. That is rather strong, in view of the evidence adduced. I do not think there can be a reasonable doubt in this case that the machinery did jam, and that it was the jamming of the machinery which caused this collision. The evidence is too strong on the point to be discarded, and it is not merely the evidence of the defendants,

(1) 12 P. D. 46.

because the pilot was called by the plaintiffs. He certainly was not disposed to do the case of the defendants any good if he could help it, but he admitted that there was no doubt that the wheel was jammed, and that that was the cause of the collision. The contention of the defendants was that it was jammed, and that immediately it was jammed the officer working it called out, "It is jammed; I cannot get it further a-port or hard a-port." If that had not been true the pilot would have taken very good care to tell us so; and if it is true that the officer called out that, then one cannot doubt the fact that the machinery was jammed. Now comes the question, was it jammed through some negligence on the part of the defendants' servants? A great many suggestions have been made to account for the way in which this gear got fixed. Among other things, it has been suggested that some one or more of the stop-valves were shut when they ought to have been left open. Well, the direct affirmative evidence from the defendants on that point is strong enough, and would of itself, I think, have satisfied me that that was not the cause of the accident, and as one of the Trinity Brethren has pointed out, you may shut all the valves, but it will not jam the machinery. It will keep the steam out of the steering gear, and the rudder will not act, but the machinery will not be jammed; and, therefore, it appears to me clear that the shutting of one of these stop-valves was not the real cause of this collision. Then it is suggested that the cause of the collision probably was that the chains, either those on the bridge, which were attached to the steam steering gear, or those aft, were not properly tightened up. Well, we have considered that, and I must say that the effect on my mind of the evidence is that there was no negligence in that respect; that the officers did their duty, and that there was no jamming of the chains and no stopping of the machinery in that way; or, even if there were, that there was no negligence, at all events, on the part of the officers in the matter. Now, a very disagreeable matter has occurred in the course of this case, and it is the conflict between the overlooker of the defendants and the pilot of the ship. [The learned judge then dealt with the evidence as to an interview between the defendants' overlooker

1891

THE MERCHANT PRINCE.

The President.

and the pilot, and continued :—] I do not place implicit credence in the story told by the pilot, but, after all, the matter is not important, so far as the decision of this case is concerned, unless it is to be inferred from the conversation that the overlooker knew that some negligence of the officers of the ship or of the employés of the defendants had brought about the jamming of the machinery, and so occasioned the accident. I do not think there is any evidence in support of that suggestion. I do not believe it occurred. It has been asked over and over again what was the cause of the jamming of this machinery. Sir Walter Phillimore says that it should be so perfect that it could not be jammed. I do not believe that could be said or proved of any machinery. The fact is, it was a good patent. The defendants had taken all precautions and care to have it properly repaired by competent people, but it did jam from something which may be called a latent defect. For some reason or other, the machinery at the critical moment (having answered perfectly well in the steering of the vessel in the river the day before, and until this accident on this day), got fixed. The wheel could not be used, and so the accident was brought about. It is, however, true that the defendants have not done what has been done in many of these cases. They have not laid their finger on the defect or the precise cause of the refusal of this machinery to act. In most cases that I recollect where the defendant has been absolved from the consequences of some latent defect in the machinery, the defect has been discovered after the accident, but that is not a necessary part of the defendants' case if he satisfies the Court that there were causes which he cannot put his finger on. There are many cases where such would be the fact; the case, for instance, of a vessel with some defect in her machinery going to the bottom. It does not follow that there was no latent defect or no latent irregularity because the defendants have not been able to point it out. The conclusion I have come to is that the machinery being a good patent, and being put up by competent and responsible workmen, failed at the time and so brought about the collision. In other words, I think the defendants have met the presumption of negligence which was cast upon them by the admission in the pleadings, and have established

that there was no negligence on their part. I, therefore, dismiss the suit with costs. 1891

THE MERCHANT PRINCE.

Solicitors for the plaintiffs: *Hill, Dickinson, Dickinson & Hill, Liverpool.*

Solicitors for the defendants: *Bateson, Warr & Bateson, Liverpool.*

T. L. M.

[DIVISIONAL COURT.] *Nov.* 23.

LEIGH *v.* GREEN.

Probate—Costs—Rule 41 (*Contentious Rules of* 1862)*—Discretion—Practice.*

Where the party opposing a will has given notice under rule 41 of the Contentious Business Rules of 1862 that he merely insists on the will being proved in solemn form and only intends to cross-examine the witnesses, the Court has no jurisdiction to condemn him in costs, such power only existing where the party giving the notice has taken proceedings to call in the probate. *Beale* v. *Beale* (Law Rep. 3 P. & D. 179) distinguished.

APPEAL from an order of the County Court for Cheshire, condemning the defendant in the costs of a probate suit.

Harriet Green, late of Winterton, in the county of Chester, deceased, died December 8, 1890, leaving a last will and testament duly executed on October 16, 1876, by which she appointed John Leigh, the plaintiff, her sole executor. Samuel Green, the defendant, who claimed to be the lawful brother and one of the next of kin of the deceased, on February 18, 1891, took out letters of administration to the estate of his sister as having died intestate. He administered the estate, and received money of which the estate consisted. Upon these facts coming to the knowledge of the plaintiff, he issued a citation on April 30, 1891, calling on the defendant to bring in the letters of administration to be cancelled.

Communications passed between the parties, and the defendant at first agreed to bring in the letters of administration to be cancelled, and to return the money which he had received; but he subsequently declined to carry out the agreement, and on May 13 entered a caveat against probate of the will being granted. A citation was then served on the defendant to bring in the

1891

LEIGH v. GREEN.

letters of administration, and the registrar made an order revoking the grant and ordering the discontinuance of contentious proceedings. The defendant's solicitors entered a second caveat, upon which the plaintiff took out a summons to stay contentious proceedings; but the registrar refused to make any order, and on July 22 the plaintiff delivered his statement of claim propounding the will and setting out the facts of the case. On August 3 the defendant filed his statement of defence, in which he pleaded that the will was not duly executed, that the testatrix was of unsound mind, and that she did not know and approve of the contents of the will; and he also gave notice under rule 41 that he only intended to cross-examine the witnesses.

The case was tried at Crewe, on September 14, 1891, when the judge pronounced for the will and reserved the question of costs. On October 14 he ordered the defendant to pay the costs on the ground that he had full information as to the execution and contents of the will before the trial, and that he had no ground for putting the plaintiff to the unnecessary expense of proving the will in solemn form.

Leave to appeal against the order condemning the defendant in costs was granted.

Loehnis, for the appellant, moved to rescind the order.

R. H. Pritchard, for the respondent. The Court has power to condemn the party opposing a will in costs even where he has given notice under rule 41, if it is of opinion that such an order is warranted by the special circumstances of the case.

In the present instance, the defendant before commencing the litigation became acquainted with all the circumstances of the case, and had actually at one time come to an agreement to give up the letters of administration, and had consented to their revocation. The litigation was vexatious—the defendant having had all possible means of testing the accuracy of the plaintiff's case. Under these circumstances the case is governed by *Beale* v. *Beale* (1), where Sir J. Hannen, in a considered judgment, condemned the next of kin in costs, notwithstanding that he had given notice under rule 41. The learned judge there referred to

(1) Law Rep. 3 P. & D. 179.

Evans v. *Knight and Moore* (1) and *Green* v. *Procter and Newey* (2), in which Sir J. Nicholl expressed his clear opinion that the Court has power to condemn the next of kin in costs even where notice has been given.

[He also cited *Urquhart & Waterman* v. *Fricker*. (3)]

[THE PRESIDENT. All these were cases not of simple opposition to a will, but of calling in probate for the purpose of revoking it.]

The question of form makes no difference ; the point is whether the Court has power to condemn a next of kin in costs, and these cases establish that it has. The judge had a discretion, and he exercised it, and this Court has no power to interfere. By s. 58 of the 20 & 21 Vict. c. 77, there is only an appeal to this Court from the County Court on questions of law and admission or rejection of evidence. There is an inherent power in all courts of justice where they consider that their process has been vexatiously put in force, to condemn the parties in costs.

Loehnis, in reply. The County Court judge had no discretion. *Summerell* v. *Clements* (4) and *Leeman* v. *George & Rosser* (5), decided by Sir Cresswell Cresswell and Lord Penzance respectively, shew that where notice has been given under rule 41 the party is protected absolutely against being condemned in costs, and the Court has no jurisdiction to entertain the question of costs. In the last case Lord Penzance was of opinion that the rule protected the defendant, though there was no reasonable ground for the litigation. *Cleare & Foster* v. *Cleare* (6) is also an authority to the same effect.

THE PRESIDENT. The question depends on rule 41, which provides that in all cases when a party opposing a will has with his plea given notice that he merely insists on the will being proved in solemn form, and that he only intends to cross-examine the witnesses, he shall be subject to the same liabilities in respect of costs as he would have been under similar

(1) 1 Add. Ecc. 229.
(2) 1 Hagg. Ecc. 337.
(3) 3 Add. Ecc. 57.
(4) 3 Sw. & Tr. 35.
(5) Law Rep. 1 P. & D. 542.
(6) Law Rep. 1 P. & D. 655.

1891

LEIGH v. GREEN.

The President.

circumstances according to the practice of the Prerogative Court. I have always understood that in the view of the Prerogative Court, as well as of this Court, it is the right of a party having interest to oppose a will to insist on the will being proved in solemn form of law, and that, if he gives notice with his plea that he only intends to cross-examine the witnesses, he is entitled to do so without being liable to any costs whatever. The exception which has been dwelt upon seems to me to be a case where there is not merely opposition to a will, but where probate has been called in by the parties with a view to having it rescinded. In the three cases cited—two before Sir J. Nicholl and one before Sir J. Hannen—it was held that a party unreasonably and improperly requiring probate to be called in may be condemned in costs. That is the distinction to be drawn between those cases and the cases cited by Mr. Loehnis, and I do not think that the opinions there expressed by Sir Cresswell Cresswell and Lord Penzance can be said to be overruled by the decision of Sir J. Hannen in the case of *Beale* v. *Beale*. (1) The principle of the thing is correctly stated by those two learned judges, and *Beale* v. *Beale* (1) does not militate against it. We are not overruling that case. The learned judge of the County Court was wrong in going into the question of costs. His order, therefore, must be reversed.

JEUNE, J., concurred.

Appeal allowed, and order as to costs reversed.

Solicitors for plaintiff: *Chesters.*

Solicitors for defendant: *Rowcliffe, Rawle & Co.*

(1) Law Rep. 3 P. & D. 180.

W. L.

MAHONEY *v.* M'CARTHY.

1891
Nov. 27.

Probate—Married Woman's Will—Desertion—Protection Order—Misrepresentation—Notice to husband—20 & 21 Vict. c. 85, *s.* 21.

A husband left his home on March 2, 1867, with his wife's consent, to seek employment in America. He was absent nearly ten years, and during that time he did not communicate with his wife except by one verbal message, as to the receipt of which there was no evidence. On his return at the end of 1876, he went at once to his wife's house, but she refused to receive him, and shut the door in his face. Next day she went before a police magistrate, and obtained a protection order under s. 21 of 20 & 21 Vict. c. 85, on the ground that her husband had deserted her on March 2, 1867. She did not inform the magistrate that her husband had returned and had offered to resume cohabitation, nor that when he went away he had left her in possession of a furnished lodging-house, by which she had earned her livelihood. No notice was given to the husband of the application for the protection order, and he did not know of the existence of the order until it was found among her papers after her death. The husband and wife met occasionally on friendly terms after the date of the order, but they never resumed cohabitation:—

Held, that the order must be taken to have been obtained by false statements, by the concealment of material facts, and without notice to the husband, and that it was therefore invalid, and must be set aside.

Cargill v. *Cargill* (1 S. & T. 235) approved.

Fitzgerald v. *Fitzgerald* (L. R. 1 P. & D. 694) explained.

THE plaintiff propounded as executor the last will of Mary M'Carthy, late of Woolwich in the county of Kent, deceased. The will was dated May 6, 1886, and the testatrix died on April 6, 1890.

The plaintiff in his statement of claim alleged that "on the 26th day of December, 1876, one of the magistrates of the police court at Woolwich granted the said deceased a protection order, which was duly registered in the county court of Kent, holden at Greenwich on January 4, 1877, and that the said protection order was a valid and subsisting order at the time of the death of the said deceased, and that she was possessed of separate property which she had power to dispose of by will." The defendant, Michael M'Carthy, the husband of the testatrix, in his statement of defence, pleaded (1.) "that the will was obtained by the undue influence of the plaintiff; and (2.) that the protection order was obtained without the knowledge of the

1891

MAHONEY v. M'CARTHY.

defendant by means of false and fraudulent representations to the magistrate that the defendant had deserted the deceased, and by fraudulent concealment of material facts," and he counter-claimed (1.) "a declaration that the said protection order was fraudulent, and should be set aside;" and (2.) "that the Court should pronounce against the said will, and that letters of administration should be granted to the defendant."

The case was heard before Jeune, J., without a jury. At the hearing the plea of undue influence was withdrawn, and the only question for the decision of the Court was the validity of the protection order.

From the evidence of the witnesses examined at the hearing it appeared that the defendant and the testatrix were married in 1863, and that there were two children of the marriage—only one of whom was living. They lived together for some years at Woolwich, where the defendant worked in the shell factory at the Arsenal and the testatrix kept a registered lodging-house which was furnished by the defendant; but differences arising between them, it was agreed in 1867 that the defendant should go to America to seek for employment. Accordingly he left Woolwich in March, 1867, his wife and her mother and other members of the family accompanying him to the steamboat pier to take leave of him. It was understood between them that he was to come back if he was fortunate and made money—and something was said by his mother-in-law about sending him money to pay his passage home at the end of a twelvemonth if he did not prosper. He remained away nearly ten years, and during the whole of that time, not being able to write, he did not communicate with his wife—except by sending her a verbal message, though there was no evidence that she ever received it. At the end of 1876, having saved 40*l.*, he returned to England, and on Christmas Day he presented himself at the house where his wife lived. She opened the door to him, recognised him, refused to let him in, and shut the door in his face. Next day she went before the magistrate at Woolwich police court and obtained a protection order on the statement that her husband had deserted her on March 2, 1867; but it did not appear that she told the magistrate that her husband had left

her a furnished house by which she was earning her livelihood, nor that he had returned and offered to renew cohabitation. No notice was given to the husband, and he was unaware that she had obtained a protection order until it was discovered among her papers after her death. They never cohabited together again, although they met occasionally on friendly terms at family gatherings, and she allowed the son to visit his father. By her will she disposed of property amounting to nearly 3000*l.*, which she divided among her relatives, including her son and her brother, the plaintiff.

Willis, Q.C. (*R. Wallace*, with him), for the defendant. *Mudge* v. *Adams* (1) is an authority for setting aside a protection order after the death of the wife, and also for including a claim for the discharge of such an order and for a judgment against the validity of the will of a married woman in the same action. There was no desertion in this case—for where there has been a separation by agreement, as in this case, there can be no desertion until there has been a resumption of cohabitation: *Fitzgerald* v. *Fitzgerald* (2); *Reg.* v. *Leresche.* (3) In *Cargill* v. *Cargill* (4), Sir Cresswell Cresswell expressed an opinion that there must be a distinction drawn between desertion for the purposes of judicial separation and desertion for the purposes of a protection order, and that as in the latter case desertion means not only that the husband has absented himself but has left his wife unprovided for, such desertion must continue at the time of making the order —and a bonâ fide offer on the part of the husband to return to cohabitation and to provide for the wife would take away her right to have such order made. There is a difference between the two remedies; judicial separation is a punishment for marital misconduct—but a protection order is intended to provide for the wife, and becomes unnecessary when the husband is willing to return and provide for her. As to the manner in which the order was obtained, *Matthew* v. *Matthew* (5) is an authority for contending that this Court would not have made such an order,

(1) 6 P. D. 54.
(2) Law Rep. 1 P. & D. 694.
(3) [1891] 2 Q. B. 418.
(4) 1 Sw. & Tr. 235.
(5) 19 L. T. 662.

1891

MAHONEY v. M'CARTHY.

unless notice had been given to the husband when his whereabouts was known. The order was obtained by suppression of material facts, which if they had been made known to the magistrate, would certainly have induced him to refuse it.

Searle, for the plaintiff. The circumstances amount to desertion, for though the wife acquiesced in her husband going away, it was only for the temporary purpose of seeking work, and her mother offered to pay his passage back at the end of a twelvemonth if he was not successful. But he did not take advantage of that offer; he did not return for ten years, and he never communicated with his wife, though he knew where to find her if he had wished; while she, on the other hand, had no means of communicating with him, and he never gave her any indication of where he was to be found. These facts tend to shew that he had never any intention to return. No doubt when he did return and found she was prospering in her business of a lodging-house keeper he was willing to come back and live with her, but the desertion was then complete, and though it may be difficult to fix the exact moment at which separation became desertion, yet when that offence was complete, the husband had no right by an offer to resume cohabitation to deprive the wife of the protection which the law had provided for her. If a husband could thus defeat the operation of the Act it would be a dead letter, and the only use of a protection order would be to give notice to the husband or his creditors that his wife had acquired property. If a man deserts his wife, and she afterwards becomes possessed of means, she has a right to get a protection order and to refuse to take him back. *Cargill* v. *Cargill* (1) is only a dictum and not a binding decision. The date of it is 1858—very shortly after the passing of the Act—and the fact that no case can be cited since in support of that dictum detracts from its authority. As to the want of notice to the husband, that is immaterial, because the wife could have got an order before he returned, when of course no notice could have been given. The argument drawn from *Fitzgerald* v. *Fitzgerald* (2), that where there has been a separation there can be no desertion except after resumption of cohabitation, does not apply to this case. It applies to cases

(1) 1 Sw. & Tr. 235. (2) Law Rep. 1 P. & D. 694.

where the husband and wife have been living apart by agreement, whereas in this case there was only a temporary separation for a temporary purpose.

JEUNE, J. There is no doubt that even after the wife's death a protection order may be set aside. That is established by the case of *Mudge* v. *Adams*. (1) The late President in that case, in dealing with the conditions under which an order can be set aside, points out that the fact of the wife being dead imposes on the Court the necessity for greater care, and on the person who asks for the order to be set aside a greater difficulty of proof. The President said, "The husband undoubtedly comes with a heavy burden upon him to establish that that which was done by his wife twenty years ago was done fraudulently, and of course if it can be proved he has been knowingly lying by, the burden imposed upon him will be still heavier." The second branch of that observation is in this case answered by this—that the protection order was never brought to the knowledge of the husband until after his wife's death. The first branch of the observation applies to the present case, and I have now to decide whether the protection order in the present instance was obtained by the concealment of material facts.

There are several points to be considered. In the first place, was there any desertion at all? It is clear that the husband left the country with his wife's consent. That is admitted by the plaintiff's witnesses. It is further, indeed, urged on behalf of the husband that the case of *Fitzgerald* v. *Fitzgerald* (2) shews that there must be a resumption of cohabitation before there can be desertion. I cannot, however, agree that that is so, because though it may be perfectly true that if there has been a separation by consent, that is to say, an agreement to live separate, there cannot be desertion without a return to cohabitation, such a rule does not apply where the absence has not been in pursuance of an agreement to live separate, but merely for a temporary reason and amounting only to a temporary separation. In this case a temporary separation only was at first intended, and I agree with the counsel for the plaintiff, that there may be

(1) 6 P. D. 54. (2) Law Rep. 1 P. & D. 694.

1891

MAHONEY v. M'CARTHY.

Jeune, J.

circumstances tending to shew that although there be no intention to desert at the beginning, there may afterwards be desertion without resumption of cohabitation. That is a matter of evidence. There must be evidence here to prove that the husband had changed his mind about returning to his wife; but I am bound to say there was singularly little of it. An effort has been made to shew that as the mother-in-law offered to pay his passage back if after a year's experience he wished to return, there must have been an intention to desert existing in his mind when he did not return at the end of that time. But the fact of the offer is not uncontroverted, and I think the inference highly doubtful. Then it is said that the man did not communicate with his wife, and that though he could not write he might have asked somebody to write for him. But he does appear to have sent a message to her, and he says he heard she was doing well. On the whole, I do not think that I can say that there was desertion.

The next point turns on the offer which the husband made to resume cohabitation, and it is urged that, according to the expression of opinion by Sir Cresswell Cresswell in *Cargill* v. *Cargill* (1), no protection order after such an offer ought to be made. It was contended that this was only a dictum, but it is a dictum of a judge of the highest authority and is entitled to the greatest weight. I respectfully think that the dictum is right. It is clear that if a husband returns after the protection order is made, he cannot have it set aside on the mere ground that he had no notice; but it is a different thing if he comes back before it is made and offers to return to cohabitation, for then the reason for making the order disappears. It may be said that the wife had by that time accumulated money by her earnings, and required protection for them; but she had every opportunity of going to the magistrate immediately after the desertion to assert her right to have her earnings protected, and if she did not exercise her right she has no ground for complaint.

This brings us to what is the question in regard to this protection order. Did the wife practise concealment in material matters before the magistrate? To me it is clear she did. The

(1) 1 Sw. & Tr. 235.

husband had reappeared before she made the application, and she went to the magistrate because he had reappeared; but she concealed the fact of his reappearance, and his desire to resume cohabitation; she concealed the facts, which, as I have stated, lead me to the conclusion that there was no desertion—nay, she swore in terms that her husband deserted on March 2, 1867, which certainly was not true; she concealed also the fact that her husband had left her a houseful of furniture by which she had obtained an excellent living. It is laid down in *Matthew* v. *Matthew* (1) that this Court would not make such an order without requiring notice to be given to the husband if his whereabouts was known. If it can be shewn that the notice was immaterial, one might perhaps not be inclined to set aside the order of a magistrate on that ground alone. But it was material. By avoiding bringing her husband before the magistrate she was able to conceal and did conceal from him the material matters I have specified. If she had stated all the facts of the case as she knew them, and we now know them, would any magistrate in the country have given her a protection order? I think not, and therefore it appears to me that, though she is dead, and even after this long interval of time, this protection order must be set aside.

Solicitors for plaintiff: *S. W. Johnson & Son.*

Solicitors for defendant: *Peckham, Maitland & Peckham.*

(1) 19 L. T. 662.

W. L.

C. A.
1891
Oct. 27.

[IN THE COURT OF APPEAL.]

MIDWINTER *v.* MIDWINTER.

Divorce—Practice—Settlement of Wife's Property—Inquiry before Final Decree—Jurisdiction—Matrimonial Causes Act, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 45—*Matrimonial Causes Act*, 1859 (23 *&* 24 *Vict. c.* 144), *s.* 6—*Rules of Divorce Court*, *r.* 95.

By the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 45, in any case in which the Court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, if it shall be made appear to the Court that the wife is entitled to any property either in possession or reversion, it shall be lawful for the Court, if it shall think proper, to order such settlement as it shall think reasonable to be made of such property, or any part thereof, for the benefit of the innocent party and of the children of the marriage:—

Held, that the Court has jurisdiction before pronouncing a final decree for dissolution of marriage, or judicial separation, against a wife for adultery, to direct an inquiry as to her property, so that it may be enabled to order a settlement to be made of such property as soon as the final decree is pronounced.

In making such an order, the Court will direct the husband to give security for the costs of the inquiry, in case no final decree should be made.

Motion by the petitioner, who had obtained a decree for dissolution of marriage on the ground of his wife's adultery, for an order for a settlement of her property.

It appeared that on June 19, 1890, a decree nisi was pronounced for the dissolution of the marriage between the petitioner and his wife, on the ground of the adultery of the wife. There were living six children of the marriage.

On December 15, 1890, the husband presented a petition in which he stated that his wife, the respondent, was entitled to certain property therein specified, for her separate use, and praying that the Court would order that the respondent should settle the said property upon trust during the joint lives of the petitioner and the respondent, to pay to the petitioner 700*l.* a year, and after the death of the petitioner to apply the same annual sum for the benefit of the children of the marriage.

The respondent having filed an answer to the petition, the matter was referred to the registrar, who made his report dated January 6, 1891, by which he certified that the total annual income of the petitioner was about 350*l.*, and that the respondent

was possessed of leasehold house property vested in the trustees of her father's will, one of whom was the petitioner, producing about 1100*l.* a year, and that she was also entitled to a further income of about 60*l.* a year under a post-nuptial settlement; and that the trusts both of the will and the post-nuptial settlement gave the respondent a life interest for her separate use without power of anticipation. He further reported, that it did not appear that the respondent had any property not subject to restraint on anticipation.

The opinion of the Court was therefore desired upon the report as it stood, before considering the questions as to the amount to be settled. The petitioner accordingly moved before Jeune, J., that the respondent, on the decree nisi for the dissolution of marriage being made absolute, should settle the property to which she was entitled under the will of her father, and also the property to which she was entitled under the post-nuptial settlement upon trust to pay to the petitioner during his life 700*l.* a year, and after his death to apply the same for the benefit of the children of the marriage; and that a deed should be drawn up forthwith for carrying out such trusts, to be settled by the registrar; and that the respondent should be ordered to attend in Court when the decree nisi was made absolute, and should execute the deed immediately thereafter; or if she should refuse, that the deed should be executed by the registrar on her behalf.

The respondent opposed the motion on the ground that the Court had no jurisdiction to make the order asked for, until the decree for dissolution of marriage had been made absolute.

Jeune, J., without deciding that the Court had no jurisdiction to make such an order before the decree nisi was made absolute, was of opinion that, as no evidence had been given that the respondent intended to defeat the order of the Court, there was no reason for departing from the ordinary practice of making an order on the petition after the final order had been pronounced; and accordingly dismissed the application.

The petitioner appealed.

The decree nisi had not been made absolute at the time when the appeal was heard.

C. A. 1891

MIDWINTER v. MIDWINTER.

Inderwick, Q.C., and *Priestley*, for the petitioner. The petitioner, on the argument of this appeal, will only press for an inquiry into the property of the respondent, and does not propose to extend the inquiry to the property included in the post-nuptial settlement. The 5th section of the Divorce Court Act, 1859 (22 & 23 Vict. c. 61), appears to postpone the inquiry as to property comprised in settlements till after the final decree. But there is no such restriction in the 45th section of the previous Act of 1857 (20 & 21 Vict. c. 85) (1) which enables the Court to order a settlement of property for the benefit of the innocent party. And by sect. 6 of the Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144), any instrument executed pursuant to any order of the Court made under 20 & 21 Vict. c. 85, s. 45, at the time or after the pronouncing of a final decree of divorce or judicial separation shall be deemed valid, notwithstanding the disability of coverture at the time of the execution thereof. It may be conceded that the order for the execution of the settlement cannot be made till the final order is pronounced, but it may be made immediately afterwards, if the necessary inquiries have been already made and the settlements prepared. The wife, after the decree is made absolute, becomes a feme sole, and her property becomes freed from the restraint on anticipation and may be affected by the order of the Court; but if no order is made, there is nothing to prevent her from marrying another husband the next day, and then the restraint on anticipation will again attach to the property, and the Court will have no control over it. It is therefore necessary to present the petition and promote the inquiries before the decree is made absolute, and there is nothing in any of the Acts which takes away the Court's jurisdiction to make the order asked for.

Jelf, Q.C., and *Mulligan*, for the respondent. The Court has

(1) 20 & 21 Vict. c. 85, s. 45: "In any case in which the Court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, if it shall be made appear to the Court that the wife is entitled to any property either in possession or reversion, it shall be lawful for the Court, if it shall think proper, to order such settlement as it shall think reasonable to be made of such property or any part thereof, for the benefit of the innocent party, and of the children of the marriage or either or any of them."

no jurisdiction to make such an order as the petitioner asks for before the decree is made absolute. But admitting, for the purpose of the argument, that it has jurisdiction, it would be inexpedient to exercise it in this case. The 95th rule of the Rules of Procedure under the Matrimonial Causes Act, provides that applications to the Court under sects. 32 and 45 of the 20 & 21 Vict. c. 85, and sect. 5 of the 22 & 23 Vict. c. 61, are to be made in a separate petition; and by rule 96 in cases of application for maintenance under sect. 32 of the 20 & 21 Vict. c. 85, such petition may be filed as soon as a decree nisi has been procured and not before. Then rule 101 directs that the petition and answer, and any further pleadings when completed, are to be referred to one of the Registrars, who shall investigate the averments therein contained in the presence of the parties, their proctors, solicitors, or attorneys, and the Registrar shall report to the Court the result of his investigation, and any special circumstances with reference to the prayer of the petition. These rules clearly contemplate proceedings after the final decree has been procured. It is not certain that the order nisi will ever be made absolute, or that any settlement will be made at all; and then the expenses of all these inquiries will be thrown away, or may have to be borne by the wife or the co-respondent. The petition proceeds on the assumption that if the order for inquiries should be made after the final decree, the respondent would evade it by marrying immediately; but there is no evidence of any such intention on her part, and if there should be such evidence when the decree absolute is applied for, the petitioner can apply to have it postponed till the Court is satisfied, as in applications for a settlement of the husband's property under sect. 32 of the Act of 1857. The practice of the Court is that all applications like the present one should be deferred till after the final decree.

LINDLEY, L.J. The point raised on this appeal is somewhat novel and not altogether free from difficulty. The case is this: A husband has obtained a decree nisi for a divorce from his wife on the ground of her adultery. More than six months since that time have elapsed, but the decree has not yet been

C. A. 1891

MIDWINTER v. MIDWINTER.

Lindley, L.J.

made absolute. The husband has applied by notice of motion for a settlement, and I refer to it now because it may be material with reference to the costs of the appeal. This notice of motion is that the Divorce Court will be moved on July 21, 1891, not for a decree nisi, or for an order to be made after the decree nisi, but that the respondent, on the decree nisi being made absolute, may settle the property to which she is entitled. That is to say, he asks for an order as soon as the motion can be heard that she may settle it after the decree absolute. That appears to me to be erroneous in point of form, as will appear by reference to the sections of the Acts of Parliament.

The contention of the husband is in substance that he is entitled to a decree absolute when he applies for it, which he intends to do; and also, that he is entitled to ask for a settlement by the Court of the property of his wife. He is not asking, at present at all events, for the variation of any settlement. He has ascertained that his wife is entitled for life without power of anticipation to some property under her father's will. The restraint on anticipation will apply so long as she is covert; it will apply until there is a decree absolute, and it will apply, if she marries immediately after the decree, to the subsequent marriage. Therefore the husband suggests, that although he may obtain an order for a settlement, the settlement may be worthless because of the restraint on anticipation, which cannot be got rid of by any proceeding under the sections which relate to alteration of settlements, and he therefore asks the Court to place him in a position to obtain what he is really entitled to; first of all, to make the decree absolute, and then five minutes afterwards to make an order for the settlement of the property to which she is entitled at the time of, or immediately after the decree absolute. And, in order to obtain this, he asks that he may be allowed to take proceedings for the purpose of informing the Court what property this lady will be in a position to settle as soon as she is divorced.

Now, it was said that there is no jurisdiction on the part of the Court to direct any such inquiry; that there is no jurisdiction to enable the Court to inform itself as to what it can or cannot do when the time for doing something arrives. That was rather

a startling proposition, and the defendant practically abandoned that contention. The question turns upon the 45th section of the first Divorce Act, 20 & 21 Vict. c. 85, and upon the amending section, 23 & 24 Vict. c. 144, s. 6, and on the Rules 95 and 101.

Upon looking at these sections and rules, it is impossible to hold that there is no jurisdiction in the Court to direct such an inquiry as is asked for by the petitioner, so as to enable the Court to order the wife to make a settlement as soon as she is in a position to do so by being divorced. I do not say now whether the order can be made upon the same piece of paper as the decree absolute; possibly it cannot. The logical difficulty arises, that until the decree absolute is made she is covert, and she must be discovert before she can make a settlement which may involve the necessity of a delay of five minutes.

Having arrived at the conclusion that there must be some method of putting the Court in the position of ordering a settlement if it thinks proper to do it, the next question is whether in this particular case there ought to be any such enquiry? I am not going to suggest on the part of the wife any conduct which can be considered in the slightest degree improper, or as involving anything like an attempt to avoid the jurisdiction or the power of the Court. The husband says, as I have already mentioned, that he will ask, as soon as he has obtained his decree absolute, for an order that the respondent be made to settle certain property. He says, that in accordance with the practice of the Court, he wishes to be in a position to tell the Court what that property is. Then the objection to it is, that apart from the question of jurisdiction, there is no necessity for it, because the materials are already before the Court; there has been, in fact, an inquiry already, and there has been what is called an interim report, and that report is sufficient for the purpose. I do not say it is not sufficient to enable the Court to make an order in general terms which would bind the property referred to in the order, but I do say, as every conveyancer would say at once, that the details of the property in that order are not such as a conveyancer would pass as sufficient when he came to enumerate the parcels; whether he had recourse to a

C. A. 1891

MIDWINTER v. MIDWINTER.

Lindley, L.J.

schedule or otherwise, the property to be settled appears to be too vague. A more definite statement of the property is necessary to settle it, if the Court thinks it right to settle it.

Then it is said the inquiry is premature, and that the cost of the inquiry in this case or in similar cases might be large, and it would be hard on the co-respondent, or the wife, if they had to bear the costs of that inquiry. There is good sense in that observation, and we propose to deal with it in this way—let the costs be secured by the husband, and upon his giving security for costs the inquiry will be made. The only other question is, what ought to be done with the costs of the motion and of the appeal? The learned judge of the Divorce Division has made the husband pay the costs; he has dismissed his application with costs. His application was so wrong in form that I am not surprised at that, and we shall not give him his costs below. As to the costs of the appeal, we are all agreed that there should be no costs. The husband has asked a great deal more than he could possibly be entitled to. He has at the end of his notice of appeal asked in the alternative for "such an order as the Court thinks right." The order, which we think right, is to give him what he has not specially asked for, namely, an inquiry, and no costs, and the order of Jeune, J., will be discharged; and there will be no costs either here or below.

BOWEN, L.J. I am of the same opinion. The only question upon which we are asked to pronounce a judgment which can be of any interest to the profession is the question whether the petition for inquiry, under s. 45 of 20 & 21 Vict. 85, can properly be presented and dealt with by the Court before the decree is made absolute for a divorce, or whether, under s. 45, it is necessary before proceedings are taken to obtain an inquiry, that the parties must wait till the sentence of final divorce has been pronounced. That is the question of law which arises in this case.

There is also the further point, whether there is in this particular case reason for exercising the jurisdiction, supposing the jurisdiction of the Court to be established? I say those are the real matters upon which the judgment turns, so far as it is a

judgment containing any legal interest, because the form of the summons taken out here on the motion made in this Court is hopelessly wrong, as my brother Lindley has pointed out. With regard to the question of the jurisdiction, can a petition be presented for inquiry under s. 45, and can it when presented be dealt with in any way by the Court before the final order for divorce is made? Now s. 45 is a section which no doubt gives the Court jurisdiction; but it must be observed that the section is one which deals with procedure in a pending suit, and in order to construe the section accordingly, let us see whether the inquiry which is sought for is a proceeding which the Court has power to grant. One must look carefully to see what the exact right to relief is which arises during the six months which is to turn a decree nisi into a decree absolute. At the end of six months a petitioner has an absolute right as against the respondent and co-respondent, to relief in the nature of a final sentence of divorce. It is perfectly true that during the interval facts may be brought to the knowledge of the Court, by a machinery introduced through a subsequent Act of Parliament which will justify, or in conscience compel, the Court, to refuse the relief to which primâ facie the petitioner is entitled; but as regards the co-respondent the litigation is practically at an end as soon as a decree nisi has been pronounced, and the petitioner, unless he is displaced by the action of the Queen's Proctor, or the action of some person standing in the same position as the informant of the Court, is entitled at the end of six months to immediate divorce. With that right s. 45 couples another right to relief for the benefit of himself and children, if any, of the marriage. It is a right to have a settlement made of property to which the wife is entitled in possession, or in reversion, for the benefit of the innocent husband and children of the marriage. That is the second relief. Now it may be, in many cases, essential to justice that the second relief as regards the settlement should be reaped immediately, or with as little interval as possible elapsing after pronouncing the final decree itself. Delay between pronouncing the final decree and the settlement may be injurious to the innocent party, and it may be injurious to the children, because it may put it in the

C. A. 1891

MIDWINTER v. MIDWINTER.

Bowen, L.J.

wife's power to defeat the settlement which otherwise would have been made, by marriage or otherwise. Therefore, even if, as a matter of strict logic, these sentences are separate, and the sentence of divorce precedes logically the judgment or decree for settlement of property; nevertheless, for the purposes of justice, it is necessary that the two things should be dealt with substantially at one time.

On the other hand, the petitioner may require for his own purposes that the sentence of final divorce should be pronounced immediately; he is not obliged to stay his hand in order that fresh proceedings should be taken for an inquiry which may perhaps take weeks or months before it is completed and before the final settlement is made. Can it be the intention of the legislature that the innocent party should be put on the horns of a dilemma, either not to ask for the decree absolute to be pronounced at once—to delay his divorce from the woman who has wronged him—or to abandon the interests of the children of the marriage, and by taking his decree for a final divorce at once to let some time pass during which the interests of the children may be at the mercy of the wife?

It is obvious, therefore, that unless you are to do injustice to the innocent party, and unless you are to place at the mercy of chance the interests of the innocent children, it is essential so to read this section in some way or other as to prevent the necessity of delay between the final order for a settlement, and the sentence which the Court makes of a final divorce. The two things ought to be done at once. When you recollect that this section is one giving power to the Court to deal with matters of settlement, is it not obvious that there must be an inherent power in the Court to provide at any time during the suit for the proper collection of such materials, and at such times, as may be necessary to enable effective orders to be made, which justice and the protection of innocent persons require should be made promptly? Unless you suppose that there is such an inherent power in the Court, and that this section, in giving the Court the power of pronouncing the two decrees almost what I may call simultaneously, also confers upon the Court the power of creating such machinery as is necessary for the

purpose of doing that, the section of the Act of Parliament is so framed as to work an injustice. It follows that the Court has power, in any particular case, in order to protect the interests I have mentioned, to set in motion machinery, before the date of the final sentence of divorce, for the purpose of enabling it to deal effectively and immediately on the final sentence of divorce with the further subject then brought before it, namely, the order for settlement.

Therefore, on that ground it appears to me that the true conclusion is, that to give effect to sect. 45 in the way that justice requires, the jurisdiction of the Court must be taken to be established by this judgment of ours. With regard to the discretion to be exercised, it is of course not a power which ought to be lightly exercised, and it ought not to be exercised in such a way as to be capable of being abused. The Court ought not to exercise the power it has of collecting the materials before the moment comes for using it, unless it is fairly and reasonably apparent that there is a necessity for so doing, but ample protection can be given in this case, and ample security can be obtained against the possibility of any abuse, by the terms which we shall embody in our order that security for costs should be given by the person who wishes to embark on this inquiry.

That being done in this case, it seems to me no injury can accrue to the respondent or the co-respondent by granting the prayer of the petitioner; and I cannot help thinking that from the way in which this case has been fought, and from the acuteness and intensity of the conflict, there may be some substantial danger, not merely shadowy, of injustice being worked if we did not enable the collection of materials to be performed before the decree absolute is made.

KAY, L.J. I entirely agree with what has been said by the other members of the Court; and I should add nothing, but that I think it is more respectful to the judge of the Court below to state in a few words my own opinion upon the question of jurisdiction.

I am not quite sure that we are really differing from him upon

C. A. 1891

MIDWINTER v. MIDWINTER.

Kay, L.J.

this question. I do not read his judgment as containing any absolute decision that there was not jurisdiction to make the order for the inquiry. In my opinion, this question must be decided in favour of the present appellant. It seems to me there must be jurisdiction. I will not repeat again the reasons which have been given by the other members of the Court for holding that there must be that jurisdiction, because of the very great inconvenience which must result from any other view of the matter, but I think when one looks at the statutes, and the rules made under them, it seems plain that it was the intention of the legislature, and of those who made these rules, that a petition for a settlement under such circumstances as exist in the present case might be presented before a decree absolute was made. I agree that the settlement cannot be made until the decree absolute has been pronounced, and it seems to me reasonable to hold that it should not be by the very same decree, but it should be a subsequent order; still it may be the moment subsequently. Directly the decree absolute has been pronounced there is power to order a settlement to be made in circumstances like the present of such property as the wife has power to settle.

The circumstances here are very peculiar. It seems that information has already been obtained that the wife has—not by a marriage settlement, which by s. 5 of the Act of 22 & 23 Vict. c. 61, could be altered, but under the will of her father which cannot, by any of the statutes, as I understand them, be altered at all—a life interest for her separate use in property devised by that will, as to which she is restrained from anticipation; and, therefore, while the coverture exists, that is until after the decree absolute has been pronounced, she has no power to settle that property, and the Court, as I read the statute, has no power to either make a settlement, or compel her to do so, of that property. The order for settlement must be made after the decree absolute has been pronounced. But then looking at the language of rule 95 I find that an application to the Court to make that order is to be made by a separate petition, which must, unless by leave of the judge, be presented as soon as by the statutes such application can be made, or within one month thereafter. The

statutes, so far as I have examined them, and as I understand from the arguments at the bar, do not contain in any part of them any distinct statement when the petition is to be presented; but looking at the Act which has been referred to, the 23rd & 24th Vict. c. 144, s. 6, it is plain that it is contemplated that a settlement might be made by a deed at the time of pronouncing the final decree. But if it is necessary to present a petition in order to obtain that settlement, and the settlement may be made at the time of pronouncing a final decree, it follows, of course, that the petition must have been presented before the time of pronouncing the final decree; and, therefore, looking at the letter of the statute, it seems to me that it contemplates the presentation of a petition for a settlement of the wife's property, under circumstances like the present, before the final decree has been pronounced; and it is extremely reasonable, for reasons which I will not repeat, as they have been fully given by the other members of the Court, that this should be the course of procedure in certain cases.

In this case I am not at all intimating that I have an opinion that it is the intention of the wife to do such an act, but it is possible that the wife within the shortest time possible, after the decree absolute has been pronounced, might marry again. If the petition could only be presented after a decree has been made absolute, some time must elapse before an order could be made upon the petition, during which she might marry again, the fetter of the restraining provision would immediately attach upon the subsequent marriage, and then the Court would be defeated in any attempt to make a settlement. As I have said, I do not mean to say that there is any evidence before us in this case that that is the intention of the wife, and it is quite possible there is no legal wrong intended whatever; but she would be perfectly within her right in marrying again within such time as would defeat a settlement which was only applied for in a petition presented after the decree absolute had been pronounced. Therefore there is every reason for holding, as I hold without the least hesitation, that it is competent for the husband in such a case as the present to present a petition for settlement before the decree absolute has been pronounced.

C. A. 1891

MIDWINTER v. MIDWINTER.

Kay, L.J.

When one arrives at that conclusion, and that is the only really important question before us, the rest is a matter of discretion in the particular case. It does not follow that because the petition may be presented that the Court is bound to make an order for inquiry before the decree absolute has been made. In this case there is no harm in directing that order to be made if we provide, as we propose to do, that the costs of the inquiry should be secured in case, as might happen, either by the death of the husband, or for other reasons, no decree absolute is ever pronounced. With that security it seems to me this is a case in which it would be proper and right that the inquiry should be made.

I agree with the other members of the Court in the conclusion to which they have arrived.

LINDLEY, L.J. The minute of the order will be this:—

Discharge the order, no costs here or below, the applicant undertaking to give security for the costs of the inquiry hereafter directed; refer it to the registrar to inquire and report what property the respondent is entitled to, and whether in possession or reversion. The security for costs will be adapted to this particular case, that is to say they will have to be paid unless the decree absolute is made.

The registrar will also report what settlement he thinks ought to be made.

Appeal allowed.

Solicitor for appellant: *W. W. Palmer.*
Solicitors for respondent: *Webster & Webster.*

M. W.

[IN THE ARCHES COURT OF CANTERBURY.]

1891
Nov. 25.

BOYER *v.* THE BISHOP OF NORWICH.

Ecclesiastical Law—Duplex querela—Presentation by College on Nomination of Roman Catholic—13 *Anne, c.* 13—"*Nomination*"—*Order in Council of February* 26, 1880, *approving Emmanuel College Statutes—The Universities of Cambridge and Oxford Act*, 1877 (40 *&* 41 *Vict. c.* 48), *ss.* 28, 45.

The 1st section of 13 Anne, c. 13, enacts that, "Every Papist and every mortgagee, trustee, or person in any ways intrusted directly or indirectly, mediately or immediately, by, or for any such Papist, whether such trust be declared by writing or not, shall be disabled and is hereby made incapable to present, collate, or nominate to any benefice, prebend, or ecclesiastical living, school, hospital, or donative, or to grant any avoidance of any benefice, prebend, or ecclesiastical living, and every such presentation, nomination, collation, and grant, and every admission, institution, and induction to be made thereupon shall be utterly void."

The statutes of a college in the University of Cambridge, approved by Order in Council under the Universities of Oxford and Cambridge Act, 1877, provided that the heir for the time being of Sir W. D. should have the perpetual right of nominating to the college for presentation to the rectory of B., within three months of such rectory being vacant, a fit person being a graduate of the college and qualified by birth or education as in the statutes specified, and that in the event of such nomination not being made to the college within three months of the avoidance of the rectory, the rectory for that turn only should be subject to the same rules of nomination and presentation as the livings in the general patronage of the college.

The libel in a suit of duplex querela pleaded, that the above-mentioned rectory of B. becoming vacant in June, 1890, a Roman Catholic, Sir A. D. claiming to be the heir of Sir W. D., nominated the promovent in July of that year, and in accordance with the college statutes, to the college for presentation by them to such rectory; that on November 22 following, the college presented the promovent to the bishop of the diocese and to the rectory, stating that they did so on the nomination of Sir A. D.; and that the bishop in March, 1891, refused to institute the promovent thereto, his sole objection being that the nomination was by a Roman Catholic. The bishop objected to the admission of the libel on the ground that it did not disclose any right to the relief prayed for in the suit:—

Held, that the nomination made by Sir A. D. was a nomination within the provisions of 13 Anne, c. 13, and void under that Act, and that the libel must be rejected with costs.

THIS was a suit of duplex querela, in which the grievance complained of was the refusal of the Bishop of Norwich to institute the promovent, the Rev. Charles Edward Pochin Boyer, to the rectory of Brantham, in the county of Suffolk.

1891

BOYER v. BISHOP OF NORWICH.

The petition of the promovent and an affidavit to lead the monition were brought into the registry on April 10 last, and the fiat of the Dean of Arches (The Right Honourable Lord Penzance) having been obtained, the monition with intimation arrived on the 15th of the same month. (1)

Service of the monition having been accepted, an appearance for the Bishop of Norwich was entered on April 23; and on May 2nd, the solicitors for the promovent brought in the libel, alleging so far as material as follows:—

1. The promovent graduated at Emmanuel College, Cambridge, in 1883, was ordained deacon in 1884, and priest in 1888.

2. The rectory of Brantham, in the county of Suffolk and diocese of Norwich, became vacant in the month of June, 1890, by the death of the Reverend John Plummer Boyer, the late rector thereof.

3. By an Order in Council, made in accordance with the provisions of the Universities of Oxford and Cambridge Act, 1877, certain statutes relating to the foundation of Sir Wolstan Dixie, Knight, made December 12th, 1878, by the governing body of Emmanuel College, Cambridge, under the powers of the Universities of Oxford and Cambridge Act, 1877, were approved by Her Majesty in Council, and by virtue of the said statute of 40 & 41 Vict. c. 48, became good and valid in law.

4. By statute 1, s. 3, of the said statutes made by the said governing body of Emmanuel College, it is provided as follows:—

"In lieu of any right of nomination heretofore vested in the heir for the time being of Sir Wolstan Dixie, such heir shall have the perpetual right of nominating to the college a fit person for presentation to each of the rectories of Boddington in Northamptonshire, of Brantham in Suffolk, and North

(1) After averments in the usual terms setting forth the particulars of the complaint of the promovent; that he had prayed for a remedy, and that the assistance of the Court would be extended to him, the monition proceeded to peremptorily monish the Bishop of Norwich that "he within the space of *eighteen* days from the service of the monition, and of which there were assigned him *six* for a first monition, *six* for a second, and *six* for the last and peremptory monition," institute, and invest the promovent to the rectory of Brantham, &c., and to direct that if at the expiration of the said eighteen days the promovent was not instituted and invested, the Bishop of Norwich should be cited peremptorily to appear in the suit on or before the *twenty-fourth* day after the service of the monition, and shew a reasonable cause why the promovent should not be instituted and invested to the said rectory, concluding with an intimation that in default the promovent would be instituted and invested, and an inhibition against the Bishop of Norwich, his vicar general in spirituals, and all others in general attempting to make, or causing to be attempted or set forth, anything to the prejudice of the promovent pending the suit.

Benfleet in Essex, whenever these benefices shall respectively be vacant, provided that the person nominated be a graduate of Emmanuel College, who either shall be of the kin of Sir Wolstan Dixie, or shall have been educated for the space of one year at least at Market Bosworth School; and provided also that the nomination be communicated in an attested form to the master of the college within three calendar months of the voidance of the benefice to which it refers. In the event of such nomination not being made to the college by the heir to Sir Wolstan Dixie within three calendar months of the voidance of the benefice, the benefice for that turn only shall be subject to the same rules of nomination and presentation as apply to the benefices in the general patronage of the college."

5. On July 7, 1890, Sir A. B. C. Dixie, Bart., claiming to be the heir of the said Sir W. Dixie, and to be entitled to nominate to the said college a fit person for presentation to the said rectory in accordance with the said statutes of the said college, did in writing under his hand and seal nominate or purport to nominate the promovent, as a fit person and duly qualified in accordance with the said statutes of the said college, to the said college for presentation by the master, fellows, and scholars of the said college to the said rectory.

6. The said writing was as follows: "To the master and fellows of Emmanuel College, Cambridge, Sir A. B. C. Dixie, Bart., of Bosworth Park, sendeth greeting. I, as heir to Sir W. Dixie, deceased, do hereby nominate the Rev. C. E. P. Boyer, a graduate of your college and of the kin of Sir W. Dixie, desiring that he may be presented forthwith by you as patrons to the rectory of Brantham, Suffolk, now vacant by the death on June 4 last of the Rev. J. P. Boyer. July 7, 1890. Alexander Beaumont C. Dixie."

7. The said Sir A. B. C. Dixie, Bart., has never since the vacancy in the second article mentioned nominated any other person to the said college for presentation by the said master, fellows, and scholars thereof to the said rectory of Brantham.

8. On November 22, 1890, the said master, fellows, and scholars of Emmanuel College did, by an instrument in writing under the common seal of the said college, present the promovent to the Bishop of Norwich, the respondent, and to the said rectory.

9. The said presentation was in the words following: "To the Bishop of Norwich . . . We, the master, fellows, and scholars of Emmanuel College in the University of Cambridge, the true and undoubted patrons of the rectory of Brantham, in the county of Suffolk and diocese of Norwich, do hereby (on the nomination of Sir A. B. C. Dixie, Bart.) present to your Lordship and to the rectory and parish church of Brantham aforesaid, now become vacant by the death of the Rev. J. P. Boyer, the last incumbent thereof, the Rev. C. E. P. Boyer, clerk, in witness whereof we have hereunto set the common seal of our said college this 22nd November, 1890."

10. The respondent took exception to the said presentation on the ground that the said A. B. C. Dixie, Bart., was, as he alleged, a Roman Catholic at the time he nominated or purported to nominate the promovent, and on March 28, 1891, by letter from his secretary, the respondent refused to institute the promovent to the said rectory on the ground that the presentation was void, and that he could not institute him thereon.

1891

BOYER v. BISHOP OF NORWICH.

11. The respondent has not raised any other objection.

12. The promovent is now informed [as the fact is] (1) that the said Sir A. B. C. Dixie, Bart., at the time when he nominated or purported to nominate the promovent as in the 5th article mentioned, was a Roman Catholic.

13. The solicitor for the promovent contends that the said presentation by the master, fellows, and scholars of Emmanuel College was, when made, a good presentation by the true patrons, and that it is immaterial whether the said Sir A. B. C. Dixie, Bart., was or was not a Roman Catholic when he previously nominated or purported to nominate the promovent to the said college as in the 5th article mentioned.

14. The promovent is ready and willing to make the subscriptions and declarations, to take all necessary oaths, and to do all other acts by law required before institution.

The respondent objected to the admission of the libel, on the ground that the facts stated thereon did not disclose any grounds of complaint in this Court, or any right in the promovent to the relief prayed in and by the said libel. (2)

Nov. 12. A motion for the admission of the libel now came on to be heard before the Dean of Arches.

Sir Walter Phillimore, and *Kempe*, for the promovent.

Dibdin, for the respondent.

[His Lordship intimated that he would first hear the counsel for the respondent, in opposition to the motion, and afterwards the counsel for the promovent, in support of the motion.]

Dibdin, in opposition to the motion. The facts stated in the libel, if true—and for the purposes of the motion they must be assumed to be true in all respects—are such as to render it apparent that, in refusing to institute the promovent to the rectory of Brantham on the nomination of Sir Alexander Dixie the respondent acted lawfully. At the date of the nomination of the promovent Sir Alexander Dixie was a Roman Catholic, and, therefore, not only was the nomination such a nomination as is declared void by virtue of the provisions of the 1st section of 13 Anne, c. 13 (3); but under the same Act and section the master,

(1) The words within brackets were added by consent on the hearing of the motion for the admission of the libel.

(2) The objections to the admission of the libel were signed by counsel.

(3) The material portion of the 13 Anne, c. 13, is as follows: "Forasmuch as by an Act of Parliament made in the third year of the reign of King James the First, intituled, 'An Act to prevent and avoid Dangers which may grow by Popish Recusants,' and also one other Act made

fellows, and scholars of Emmanuel College, being within the words "trustees or persons interested for a Papist," are made incapable of presenting the promovent, and their presentation of him is made void. Such a right as that which Sir A. Dixie purported to exercise in this case—the equitable right of appointing to an ecclesiastical living—is clearly within the mischief of 13 Anne, c. 13, and it is also within the words there used, for, although the previous statutes of 3 James 1, c. 5, s. 13, and 1 Wm. & M. c. 26, ss. 1, 2, may not have in terms extended to nominations to presentative benefices: Cawley, Law of Recusants (1), p. 228; yet 13 Anne, c. 13, an Act passed to strengthen the law, does apply to the nomination in question in this case, as no reasonable ground can be shewn for not construing the word "nomination" alike in all sections of the Act where it occurs, and in the 3rd section the right of "nomination" to an

in the first year of the reign of their late Majesties King William and Queen Mary, intituled, 'An Act to vest in the two Universities the Presentation of Benefices belonging to Papists,' the presentation, nomination, collation, and donation of and to benefices, prebends, or ecclesiastical livings, schools, hospitals, and donatives, belonging to Popish recusants, and other persons thereby disabled to present, collate, or nominate, are given to the two universities: but they are so given only where such persons are and stand convicted by such ways and means as in the said recited Acts are mentioned and provided; which Acts do nevertheless prove ineffectual for such purposes, by reason such patrons are not convicted, or not in such manner as the said Acts do direct and appoint; therefore, for making the said laws more effectual, and for the speedier and easier vesting the presentations to such benefices in the two universities, according to the intention of the said laws, be it enacted . . . that every Papist or person making profession of the Popish religion, . . . and every mortgagee, trustee, or person any ways intrusted, directly or indirectly, mediately or immediately, by or for any such Papist or person making profession of the Popish religion, . . . whether such trust be declared by writing or not, shall . . . be disabled, and is hereby made incapable to present, collate, or nominate to any benefice, prebend, or ecclesiastical living, school, hospital, or donative, or to grant any avoidance of any benefice, prebend, or ecclesiastical living; and that every such presentation, collation, nomination, and grant, and every admission, institution, and induction to be made thereupon, shall be utterly void and of no effect, to all intents, constructions, and purposes whatsoever . . ."

(1) 'The Laws of Queen Elizabeth, King James, and King Charles the First concerning Jesuits, Seminary Priests, Recusants, &c., and concerning the Oaths of Supremacy and Allegiance...' By William Cawley, of the Inner Temple, Esq. London, 1680.

1891

BOYER v. BISHOP OF NORWICH.

ecclesiastical living is alone spoken of. Moreover, the right of nomination given to Sir Alexander Dixie is really within the word "presentation" as used in the Act, for "he that hath the right of nomination is in effect the patron, and he that presents at the nomination of another is but as a messenger between him and the Ordinary:" Cawley, Law of Recusants, 228; Year Book, 14 Hen. 4, c. 11.

If the Court should be of opinion that the respondent acted in accordance with the law, the whole of the libel should be rejected.

Sir W. Phillimore and *Kempe*, in support of the motion.

[THE DEAN OF ARCHES. The libel does not contain any averment that Sir Alexander Dixie was in fact a Roman Catholic at the date when he nominated the promovent.]

The solicitors for the promovent will amend the libel in this respect. Assuming this amendment to have been made, the libel would still set forth facts entitling the promovent to the assistance of the Court. In the first place, the 13 Anne, c. 13, is a penal statute, and, in conformity with the ordinary rule, to be construed strictly, and according to the strict construction of it, reddendo singula singulis, the word nomination is not used with respect to benefices presentative, but only as in the 3 James 1, c. 5, with reference to schools, hospitals, or donatives. Even conceding that some nominations to ecclesiastical livings are rendered void under the Act of Anne, the nomination here is not such a nomination as is struck at by that Act, the spirit of which is not to be found elsewhere than in the very words used. [They referred to *Walsh* v. *Bishop of Lincoln.* (1)] Thus, in s. 3 of the Act, the right of nomination to donatives is the only right of nomination referred to, and a reference to Cawley, Law of Recusants (p. 228), shews to what sort of "nominations to livings" the statute of Anne, if it does at all refer to nominations, was meant to extend—that is to say, to nominations where the person nominating was in truth the patron, and the person who had to present had no discretion, and acted ministerially. Indeed, cases in which the right of nomination was of this description were common at the time of the statute

(1) Law Rep. 10 C. P. 518, at p. 532.

of Anne, and such cases where the person having the right of nomination could bring an action of quare impedit: *Sherley* v. *Underhill* (1), and was, in fact, the equitable owner of the presentation, the presentor being merely a bare trustee, may well be within the Act. But the nomination in the present case is not a nomination of this class. It is, on the contrary, a nomination like the nomination in the case of the *Attorney-General* v. *Marquis of Stafford* (2), where the person presenting has a discretion, and may refuse to present an unqualified or unfit nominee. Nominations of this latter kind are not within the Act at all. Secondly, supposing the nomination to be void, yet still the respondent in refusing to institute the promovent acted unjustifiably; for, if the nomination was void, the same consequences must follow as if Sir A. Dixie had made no nomination at all; and it is clear from the college statutes, a portion of which are set out in the libel, that if there was not a nomination—that is, not an effective nomination—by Sir A. Dixie within three months of the vacancy of the rectory, Sir A. Dixie lost his right, and the college gained the right of presenting the promovent as the person they had themselves selected to be the new incumbent of the living. This right of presentation the college have in truth exercised by means of the instrument of presentation set out in the libel, and dated more than three months after the avoidance, and the fact that the promovent was the nominee of Sir A. Dixie cannot make the presentation so made bad. In other words, the presentation if not good as a presentation on the nomination of Sir A. Dixie, is good as a presentation by the College in their own right.

[THE DEAN OF ARCHES. What were the rights of the heir of Sir Wolstan Dixie with respect to the rectory of Brantham, antecedent to the passing of the college statutes referred to in the libel?]

Dibdin. The living of Brantham formed a portion of the Dixie estates, with regard to the settlement of which a decree referred to in such statutes was made in Chancery by Lord Keeper Wright. (3)

Cur. adv. vult.

(1) Moore, 894. (2) 3 Ves. 77. (3) Dated March 7, 1700.

1891

BOYER v. BISHOP OF NORWICH.

On November 19 the solicitors for the promovent amended the libel by annexing thereto a printed copy of the Order in Council referred to in the libel, and inserting in the libel a reference to such printed copy so annexed. (1)

1891. Nov. 25. LORD PENZANCE. This case came before the Court on an objection to the admission of the libel, practically a demurrer to it. The libel states that under the provisions of certain statutes made by the governing body of Emmanuel College, Cambridge, the heir of Sir Wolstan Dixie had secured to him the right of nominating a fit person to be presented by Emmanuel College to the living of Brantham in Suffolk. Sir Alexander Dixie, claiming to be such heir, has nominated the promovent to the college, and the college has presented him to the living. The respondent is the Bishop of Norwich, and he has refused to institute the promovent upon the ground that Sir Alexander Dixie at the time when he exercised his right of nomination was a Papist, which fact is admitted by the libel to be true, and that by the Act passed in 13 Anne (c. 13) all nominations by Papists are made void and of no effect. Whether the nomination in the present case is within this statute is the question, and the only question, to be determined. The words are, every Papist "is hereby made incapable to present, collate, or nominate to any benefice, prebend, or ecclesiastical living, school, hospital, or donative," &c.

The case was admirably argued; but when both the general intent of the statute and the words of the particular enactment are adverse, argument is rather uphill work.

The first contention of the promovent is that the words which I have quoted should be read "reddendo singula singulis," so that the words "present" or "collate" are alone applicable to the word "benefice," the word "nominate" applying only to "school, hospital," &c. The objection to this contention is that it does violence to the grammatical construction of the sentence. To this it was replied that the previous statute had used very

(1) The Order in Council in question is dated February 26, 1880, and the college statutes, as submitted for approval, will be found printed in the *London Gazette* of February 25, 1879.

similar language, and applied it in the manner suggested, but the language was not identical: it was changed, and the fair inference from the change made in it is that a different result was intended.

It was next contended that, assuming incapacity to have been imposed upon "nomination" as well as "presentation," the "nomination" intended was a different sort of nomination from that which has taken place in the present case. But why so? The word "nominate" is general, and subjected to no qualification in the statute. To restrict it by construction should only be done upon some very clear reasoning of the intent. The argument ran thus, that where the nomination is absolute it may be admitted that the statute applies. In that case the duty of presentation becomes merely ministerial; but where there is anything of discretion or judgment to be exercised by another, the nomination is not absolute in the possessor of the right, and this, it is contended, takes it out of the statute. The Court was reminded that it was contrary to well-known principle to extend a penal enactment by inference or construction; but this statute requires no extending to make it applicable to the case in hand. Its plain words apply to the present case; they coincide with the general purpose of the Act, and the only question is one of restriction and not extension. The suggested distinction, therefore, cannot be accepted by the Court. But if it could, I fail to see what there is in the present case to render this nomination anything short of absolute. True, it must be exercised within a prescribed area, but within that area it is absolute enough; and as to the word "fit," that is a condition which applies to all rights of presentation.

A last argument, if I understood it rightly, was to this effect: that, assuming the nomination to be void, the presentation by the college which followed it might endure as a valid presentation made in their own right upon the lapse of Sir A. Dixie's right of nomination. I will only say of this, that to so treat the presentation would do violence to the entire case of the promovent as made on the face of his libel; that it would do violence to the rights of the college, who never selected him as their nominee; and, lastly, that it would be absolutely inconsistent with the

1891

BOYER v. BISHOP OF NORWICH.

language of the presentation itself. The objection to the libel must prevail, and the libel be rejected with costs.

Solicitors for promovent: *Wild & Wild.*

Proctor for respondent: *Jenkins.*

C. F. J.

Dec. 15.

IN THE GOODS OF WILLIAM EVERLEY.

Administration—"Widow, but no Issue"—Pauper Lunatic—Grant to Clerk of Guardians under 20 *&* 21 *Vict. c.* 77, *s.* 73*—Next of Kin not cited—* 53 *&* 54 *Vict. c.* 29, *s.* 1.

The value of the whole property of an intestate who died leaving a widow but no issue did not exceed 500*l.* The widow was a pauper lunatic, and her father had renounced his right to take the grant on her behalf:—

Held, that a grant of administration might be made under s. 73 of the 20 & 21 Vict. c. 77, to a person nominated by the guardians of the union to whom the pauper lunatic was indebted for her maintenance without citing the next of kin of the intestate or of the lunatic.

APPLICATION for administration.

William Everley, late of Devizes, died on September 14, 1891, intestate, leaving a widow, Louisa Everley, surviving him. There were no children, and it was believed that the widow was the sole next of kin. She was a lunatic confined in the county asylum at Devizes, and was indebted in a small sum to the guardians of the poor of the union of Warminster for her maintenance. The value of deceased's estate was about 60*l.* The father of the lunatic had renounced his right to take administration on her behalf, and the guardians of the Warminster Union had nominated their clerk, Mr. Merrick, to take the grant.

Barnard, moved for a grant of administration for the use and benefit of the lunatic until she recovered, and cited *In the Goods of Eccles.* (1) In that case the Court required the next of kin of the deceased to be cited; but here they have no interest, as the net value of the estate is under 100*l.*, and by s. 1 of the Intestates' Estate Act of 1890 (53 & 54 Vict. c. 29), the real and personal estate of every man leaving a widow and no issue, when

(1) 15 P. D. 1.

it does not exceed 500*l.* in value, shall belong to his widow absolutely and exclusively. 1891

IN THE GOODS OF EVERLEY

THE COURT made a grant to Mr. Merrick for the use and benefit of the lunatic until such time as she should recover, under s. 73 of the Court of Probate Act, without requiring her next of kin to be cited.

Solicitors: *Berkeley, Calcott & Co.*

W. L.

TONGE *v.* TONGE, ANDERSON, AND EYKYN. *Dec.* 8.

Divorce—Husband's Petition — Application for Alimony pendente lite — Insufficiency of Answer — Partnership Accounts — Cross-examination of Husband—Further and fuller Answer ordered—Rule 191 *of Divorce Court Rules.*

In a petition by the husband for the dissolution of the marriage, the wife applied for an allotment of alimony pending suit. The husband in his answer admitted that his income from his business amounted to 3000*l.* a year, but objected to produce the books of the business before the registrar on the ground that they would disclose the accounts of the partnership:—

Held, that the husband's answer was incomplete, and that he must file a fuller and further answer; but that he ought not at then existing stage of the proceedings to be ordered to file accounts and to attend for the purpose of being cross-examined upon them.

APPLICATION for an allotment of alimony pendente lite.

The petition was by the husband, praying for a divorce on the ground of the wife's adultery with the two co-respondents; and the respondent in her answer denied the charges, but made no counter-charges against the petitioner.

On October 8, the respondent filed a petition for the allotment of alimony pendente lite, and alleged that the petitioner derived an income of 7000*l.* a year as a partner in the International Tea Company, and also that he was part owner of a large stock-in-trade, and possessed of pictures of great value. The petitioner admitted that his share in the profits of the company amounted to 3000*l.* a year; but he objected to give further particulars on the ground that they would disclose the accounts of the partnership.

1891

TONGE v. TONGE.

The registrar allotted alimony at the rate of 620*l.* a year, but refused to order the petitioner to attend to be cross-examined on his answer on the ground that his answer was not evasive.

Jeune, J., in chambers, made an order that the petitioner should attend for cross-examination, and also that he should file a balance-sheet shewing his profits from the business for the last three years.

Inderwick, Q.C. (*Corrie Grant*, with him) moved to discharge the order. The respondent might be entitled to a fuller and further answer, and the petitioner would not resist such an order; but he objects to an inquiry by cross-examination into the accounts of the partnership. This is a petition by the husband for a divorce, and it is not probable that in any event an order for permanent alimony will be made. The inquiry, therefore, is superfluous. The object of alimony pending suit is that the wife may have an income suitable to her position until the case is heard, and although the proportion of one-fifth has been generally accepted as a suitable allowance, it has been the practice where the income of the husband is large to fix a sum which appears to be adequate, having regard to the wife's position and necessities, without going minutely into the figures: *Edwards* v. *Edwards*. (1) It is only where the answer is evasive that the Court has been in the habit of ordering a husband to attend to be cross-examined on his answer. Where the answer is not explicit, he may be ordered to give a further and fuller answer: *Clark* v. *Clark*. (2)

Priestley, in support of the order, cited *Carew* v. *Carew*. (3)

JEUNE, J. The circumstances of that case were different, and there the husband filed a balance-sheet which disclosed an actual deficit.

I do not wish in any way to limit the effect of rule 191, which was intended to give the registrar power to take the examination of witnesses and to require the production of documents. I am not inclined to lay down any hard and fast rule which may be enforced in other cases to which it is not applicable. Each

(1) 17 L. T. 584.

(2) 31 L. J. (P. & M.) 32.

(3) [1891] P. 360.

case must be considered on its own merits. With regard to this case, it seems to me that the husband has put in an answer which may be true, but which is not complete ; and under those circumstances I think the registrar should have required from him a further and fuller answer. The petitioner must make a fuller and further answer, and the matter must be referred back to the registrar to consider it in the light of the fresh facts which may be laid before him. That is sufficient for the purposes of to-day ; but if the answer now ordered is not satisfactory, it will be open to the wife to make another application.

In an application for alimony pending suit the wife is entitled to have the clear oath of the husband as to the net profits of his business; but it must be a very strong case to justify the Court in calling for documents which would disclose partnership accounts.

Solicitors for petitioner: *Wilkinson, Howlett, & Wilkinson.*
Solicitors for respondent: *R. S. Taylor & Humbert.*

W. L.

DUPLANY *v.* DUPLANY (COHEN INTERVENING). *Dec.* 15.

Divorce—Wife's Petition—Husband found Guilty of Adultery, but not of Cruelty—Desertion by Wife without Reasonable Excuse—Decree for Judicial Separation—Practice of Ecclesiastical Courts—20 & 21 *Vict. c.* 85, *s.* 31.

In a petition by the wife for the dissolution of the marriage on the ground of adultery and cruelty, the husband in his answer charged his wife with adultery and with having deserted him without reasonable excuse. The jury found that the husband had been guilty of adultery but not of cruelty, and that the wife had not committed adultery. It appeared that the petitioner had separated herself from the respondent before his adultery.

Held, that the petitioner was entitled to convert her petition for divorce into a petition for judicial separation, and that her desertion of her husband before his adultery was not a bar to the granting of a decree of judicial separation.

THIS was a petition by the wife for a dissolution of the marriage on the ground of her husband's adultery and cruelty. The husband in his answer denied the cruelty, but not the adultery, and charged his wife with having committed adultery with the intervener. He further alleged that his wife had deserted him without reasonable excuse before the date of his adultery.

1891

DUPLANY v. DUPLANY.

The case was heard before Jeune, J., by a special jury.

The jury found that the respondent had committed adultery, but had not been guilty of cruelty, and they found that the wife had not committed adultery. It was admitted that the wife had separated herself from her husband in September, 1888, and the petition was presented in September, 1890. The adultery of which the husband was found guilty was in December 1888. There was one child of the marriage.

Inderwick, Q.C. (with him, Sir *C. Russell, Q.C.*, and *Kisch*), on behalf of the petitioner, moved the Court to pronounce a decree of judicial separation.

[JEUNE, J., referred to *Otway* v. *Otway* (1), where the Court of Appeal held that a person who has been guilty of a matrimonial offence is not entitled to relief.]

There is no desertion here, inasmuch as the parties up to a late period were engaged in negotiating for a deed of separation. In cases of judicial separation the Court is governed by the principles on which the Ecclesiastical Courts acted, and desertion was not a matrimonial offence known to the Ecclesiastical Courts. It was created by the Act of 1857, and s. 31, which makes it a discretionary bar, only applies to suits for dissolution of marriage. It would not have been regarded by the Ecclesiastical Courts as a bar to a decree for judicial separation on the ground of adultery: *Sullivan* v. *Sullivan* (2); *Morgan* v. *Morgan*. (3) In *Rowe* v. *Rowe* (4), it was held that it was no answer to a suit for judicial separation to allege that the wife had withdrawn from her husband's bed and board. The adultery occurred immediately after the wife had left her husband, and the wife's conduct cannot be said in any way to have conduced to it. If this desertion is a bar at all, it is only a discretionary bar.

C. Gill, for the respondent. The wife's petition must be dismissed. It was a petition for divorce, and the case was considered all through on that footing; but as she failed altogether to establish the acts of cruelty on which she founded her claim to

(1) 13 P. D. 141.
(2) 2 Add. 299.
(3) 2 Curt. Ecc. 679.
(4) 4 Sw. & Tr. 162.

a divorce, she cannot now be allowed to turn her petition into one for judicial separation. Moreover, she has disentitled herself to relief by wilfully separating herself from her husband. There was no adultery until after she had deserted her husband.

JEUNE, J. The first point I have to deal with is whether I should entertain an application for a decree for judicial separation; that is to say, whether a petition which was presented for a divorce may be turned into a petition for a judicial separation. It is true that the case put forward was a case for divorce. What the wife wanted was a divorce, and as grounds for it she alleged adultery and cruelty. It is true, also, as has been urged, that up to the time of the filing of the petition, although she had not a judicial separation, she was treated by her husband as though she had been judicially separated. He does not appear to have molested her; and she had the custody of her child. But although all that is perfectly true, now that by the verdict of the jury the wife has established the charge of adultery against her husband but has failed to establish the charge of cruelty, and has also failed to shew that she left her husband with reasonable excuse, the question arises whether she has a right to ask for a judicial separation as part of the general relief prayed for in her petition. It is no answer to her to say that up to this time her husband has not sought to molest her or to take her child away from her, because he is not bound to pursue the same course in future. During the argument I suggested that the matter might be arranged; but the husband—I do not blame him for it—chose to stand on his rights. Under the circumstances, it cannot be said that there are not good grounds for the wife desiring to have a judicial separation if she is entitled to it; and I am of opinion that she has a right now to ask for a decree for judicial separation, although what she asked for specifically in her petition was a divorce. In allowing the petition to be turned into a petition for judicial separation, I am doing that which was done by the President in *Otway* v. *Otway* (1), although that judgment was afterwards reversed by the Court of Appeal on the ground that the wife by her misconduct had disentitled herself to any relief at

(1) 13 P. D. 12, 141.

1891

DUPLANY v. DUPLANY.

Jeune, J.

all. But there is a further question of law, and also perhaps, a question of discretion. I accept to the full the verdict of the jury, and not only do I think that we must treat the case as one in which no cruelty has been established, but we must also regard it as established by the verdict of the jury that on September 26, 1888, the wife left her husband without reasonable excuse. Assuming that to be so, is that any defence, absolute or discretionary, to a suit for judicial separation? Before the Act of 1857, the authorities mentioned by Mr. Inderwick shew that the Ecclesiastical Courts would have granted a separation a mensâ et thoro, although there had been desertion by the petitioner without reasonable excuse. Does the Act make any difference? In terms it does not, because, although it created the offence of desertion, and made it a new matrimonial offence, it did so for a certain specific purpose, that of constituting it a ground for judicial separation, and also for divorce when coupled with adultery; but it did not constitute it a defence to a suit for judicial separation. In the case of *Otway* v. *Otway* (1), the Court of Appeal had to consider whether the adultery of the wife was an answer to her petition for judicial separation, and they held that it was, because they said that before the Act of 1857 the Ecclesiastical Court would have held adultery to be such a bar as would disqualify a petitioner from obtaining the relief of a judicial separation. Therefore, on the principles of the Ecclesiastical Court, as imported by the 22nd section of the Act, they came to the conclusion that adultery was an answer to a petition for judicial separation. Desertion, however, stands in a different position, and I am unable to say that, the Act of Parliament having abstained from making that particular offence an answer to a petition for judicial separation, I should be justified in holding it to be such. I am not blind to the argument that a new matrimonial offence was created by the Act of 1857, and that, therefore, it ought to be added to the list of matrimonial offences which, in the Ecclesiastical Court, constituted a bar to a petition for judicial separation. But that argument ought not to prevail against what appears to be the clear intention of the Act of 1857, namely, to leave petitions for judicial separation to be decided as

(1) 13 P. D. 12, 141.

they would have been decided in the Ecclesiastical Courts. But supposing that I thought that desertion constituted a defence of some kind to a petition for judicial separation, could it be more than a discretionary defence? I do not think so. The Act of 1857 makes it only a discretionary defence, where it makes it a defence at all, and the matter cannot be put higher than on the intention of the Act. If this is a matter of discretion, on the best consideration I have been able to give to the case, I should not allow the conduct of the wife, though it amounted to desertion without reasonable excuse, to be set up as a defence to her petition for judicial separation. I cannot think that it ought so to be regarded, because though she left her husband, that did not, in my opinion, justify his conduct, nor can it be said, in any proper sense, to have conduced to it. I prefer, however, to rest my decision on my view of the law; and my main ground for granting the wife a decree of judicial separation is, that I think that her desertion is no legal answer. I therefore pronounce a decree of judicial separation; and as neither party can be said to have completely succeeded or completely failed, both parties must pay their own costs.

Solicitors for the husband: *Beyfus & Beyfus.*
Solicitor for the wife: *E. Kennedy.*
Solicitors for the intervener: *Lewis & Lewis.*

W. L.

1891
Nov. 12, 13.

THE DWINA.

Admiralty—Salvage—Counter-claim for Negligence of Salvors—Collision—Diminution of Award—Costs.

In an action of salvage, the owners of the salved vessel in their defence admitted that some salvage services had been rendered, but counter-claimed for injuries sustained by their vessel through a collision caused by the alleged negligent and bad navigation of the salving vessel, and they asked, not for forfeiture of the reward, but for an allowance in account, the amount of the damages to be ascertained by a reference to the registrar and merchants. At the hearing of the action it was stated by the defendants that the amount of the damage was about 400*l.* :—

Held, that such want of skill in manœuvring the salving vessel had been proved as went to diminish the award of salvage, and the Court deducted 400*l.* damages from the sum of 800*l.* intended to have been given to the salvors, and made an award of 400*l.* with costs.

ACTION OF SALVAGE.

The plaintiffs were the owners, master, and crew of the steamship *Neva*; the defendants and counter-claimants were the owners of the steamship *Dwina*, her cargo and freight. The material facts were:—

On August 20, 1891, the *Neva*—a steamship of 884 tons gross, 528 tons net register, with a crew of eighteen hands, one passenger, and a general cargo, on a voyage from Königsberg to Hull—was off the Swedish coast, about fifteen miles to the westward of Sandhammer Lighthouse, steering W. ½ N., when about 8.45 A.M. she sighted, three to four miles off, and five to six points on the port bow, a steamer flying the signal "H. B." (want immediate assistance). The wind at the time was strong from the S.S.W., the weather was rainy, with some sea and swell setting towards the land.

The *Neva* bore down towards the port quarter of the vessel and found her lying unmanageable, with her head to the southward and eastward, and fore and aft sail set. The vessel proved to be the *Dwina*, a screw steamship of 983 tons gross and 795 tons net register, with a cargo of grain and general goods from St. Petersburg to London. On coming within hailing distance, the master of the *Dwina* informed the master of the *Neva* that

1891

THE DWINA.

her crank-shaft was broken and that he wanted to be towed to Copenhagen. The *Neva* then lowered the jolly-boat and her master boarded the *Dwina*, and it was arranged that the *Neva* should tow the *Dwina* into Copenhagen Roads, or, if practicable, into the harbour. The master of the *Neva* then returned to his vessel, and sent the same boat, manned by two men, to the *Dwina* with a hauling-line, to which was attached an 11-inch coir rope. This was hauled on board the *Dwina* and made fast to her port cable, of which about fifteen fathoms were paid out.

About 10.30 A.M. the *Neva* commenced to tow the *Dwina* (which had taken in her canvas) on a W. $\frac{1}{2}$ N. course, both vessels pitching and rolling a good deal, and the *Dwina* sheering about somewhat. About noon the coir rope parted. The *Neva* was thereupon backed down close to the *Dwina*, a heaving-line thrown on board the latter vessel, by means of which the *Neva's* 4-inch steel hawser was hauled on board, and about ninety fathoms paid out; but by the time it was secured the head of the *Dwina* had fallen off, so that the vessels were almost stern to stern, and the hawser, after getting partly underneath the *Dwina*, parted as soon as the *Neva* steamed ahead. Shortly afterwards a $3\frac{1}{2}$-inch wire hawser belonging to the *Dwina* also parted.

The master of the *Neva* then determined to try and tow the *Dwina* with one rope from the port and another from the starboard quarter, and, for this purpose, he began to manœuvre his ship towards the *Dwina's* weather side; but when the *Neva* was with her starboard side towards the port bow of the *Dwina* the wind and sea set the *Neva* down towards the *Dwina*, and, though the helm of the former vessel was put hard-a-starboard and the engines slow ahead, the starboard side of the *Neva* caught the *Dwina's* stem, causing damage to the *Neva* to the extent of about 100*l.*, and to the *Dwina* of about 400*l.*

In respect of this collision the defendants counter-claimed as follows:—

Par. 7: "The defendants say they have suffered damage from the collision which occurred between the *Neva* and the *Dwina* . . . and which was only caused by the negligence and bad navigation of the *Neva*, by the plaintiffs or some of them."

Par. 8: "Whilst the *Dwina* was lying disabled, and the *Neva*

1891

THE DWINA.

was attempting to take her in tow, the latter vessel, instead of establishing communication by a boat or carefully approaching so near as to heave a line on board, did, whilst the sea was smooth and there was little or no wind, cross the bows of the *Dwina*, and so manœuvre as, instead of passing at a safe and reasonable distance, to strike the stem of the *Dwina* with her starboard side with such violence as to carry away the stem and do a great deal of injury to her bows on both sides and caused her considerable delay to get the same repaired."

Par. 9: "The defendants claim damages for the injuries they have sustained in consequence of the said collision; a reference to the registrar, assisted by merchants to ascertain the amount of the same, and that the payment of any sum which the Court may deem to be due to the plaintiffs in respect of their salvage services may be allowed in account by the registrar and merchants in ascertaining the said damages, but not otherwise paid to the plaintiffs. . . ."

After the collision the *Neva* cleared the *Dwina* ahead, and two hauling-lines were taken to the *Dwina* by the same boat as before from the *Neva*, by means of which the ends of both parts of the 11-inch coir rope were got on board the *Dwina* and made fast.

About 1.45 P.M. the towage was resumed, and, the wind and sea having gone down, the *Neva* gradually worked her engines to full speed ahead. About 6.35 P.M., when off the Drogden lightship, each vessel took a pilot on board, and shortly after 8 P.M., after about fifty-seven miles' towage, occupying about eight hours, Copenhagen Roads were reached, where, the *Dwina* having engaged a tug, the *Neva* cast off and proceeded on her voyage.

The values were: Of the salvor—*Neva* 8000*l.*, cargo 4095*l.* freight 307*l.*, total 12,402*l.*; of the salved vessel—*Dwina* 4800*l.*, cargo (in London 10,817*l.*) at Copenhagen 10,000*l.*, freight (payable on delivery of cargo in London 393*l.* 6*s.* 9*d.*) estimated pro rata at Copenhagen 200*l.*, total 15,000*l.*

Sir Charles Hall, Q.C., and *L. E. Pyke*, for the plaintiffs. The services rendered by the salvors involved considerable fatigue and risk. The weather at the outset was bad, the locality was

dangerous, and at the time the *Dwina* was picked up she was drifting helplessly towards the Swedish coast, and would probably have been lost. During the manœuvres, owing to the repeated breaking of the hawsers, there was danger of fouling the *Neva's* propeller, her coir rope was destroyed, her steel hawser rendered useless, and her voyage delayed over eight hours. Besides this, the *Neva* was damaged to the amount of 100*l.* in consequence of the collision, which was unavoidable and was not due to any want of skill, but to the fact of the *Neva*, whilst manœuvring to windward, being set down upon the *Dwina* by the force of the wind and sea.

[THE PRESIDENT. You say that there was a strong wind, and yet the master of the *Neva* went to windward and did not lower a boat, as he might have done. No doubt allowances are to be made in favour of those engaged in rendering salvage services which would not be allowed in the case of an ordinary collision; but if the salvor is negligent, his negligence need not amount to gross negligence to render his owners liable to the salved vessel.]

The master of the *Neva* did not lower a boat at that time because he was anxious to get the *Dwina* into Copenhagen Roads before nightfall. If the master of the *Neva* was guilty of an error of judgment, that would not deprive his owners of the salvage reward to which they are entitled, for the services rendered were successful in bringing the salved vessel into a place of safety.

No doubt where the claimants' efforts do not bring the vessel into greater comparative safety, their exertions, however meritorious, will not entitle them to any salvage reward, as in the case of *The Cheerful* (1); but even there the learned judge who tried the case refused to hold the claimants of salvage responsible for damage caused by them to the vessel proceeded against, although it resulted from an unskilful manœuvre on their part; and perhaps the true view of the matter is best expressed in the words of the learned author of the latest treatise on salvage. He says (1): "In considering whether a salvor has shewn such

(1) 11 P. D. 3.

(1) Kennedy on the Law of Civil Salvage, 1891, p. 127.

1891

THE DWINA.

a want of reasonable skill and knowledge as ought materially to affect the Court's award, or is guilty only of an error of judgment, the Court will incline to the lenient view, and will take into favourable consideration any special circumstances which tend to exonerate the salvor from blame, such as, e.g., a request for help, the suddenness of the emergency, or the absence of more efficient means of succour."

Sir Walter Phillimore, and *F. W. Raikes*, for the defendants. The value of the services rendered by the salvors has been greatly exaggerated. The force of the wind was not such as—and there was no sea—to interfere with the operations if skilfully performed. The distance towed was small, and the time occupied in the towage only a few hours, including some two hours wasted in abortive and unseamanlike attempts to get the *Dwina* in tow. The weather could not have been as bad as represented, otherwise such a small boat as that used, with only two men in her, could not have carried the hauling-lines to the *Dwina*, nor could the *Neva* have got over the distance she did in the time, as she averaged seven knots. The collision was caused by the want of ordinary seamanlike care and skill on the part of the master of the *Neva*. The vessels ought never to have been in the position in which they were prior to the collision, and the efforts to make fast by heaving a line on board without lowering a boat were mistakes amounting to negligence and bad navigation on the part of their master, for which the owners of the *Neva* must suffer. The *Dwina* was damaged to an extent roughly estimated at 400*l*. By the counter-claim the defendants do not ask for an entire forfeiture of all salvage reward, but that an allowance in account be made for the damages sustained.

Sir Charles Hall, Q.C., in reply.

THE PRESIDENT (SIR CHARLES BUTT). I have consulted with the Elder Brethren during the hearing of this case, and their view accords with my own, that although I might have had some hesitation in pronouncing a decree which would render the salvors liable for the damages, and also disentitle them to salvage remuneration, yet there was in the performance of this service a want of skill and care which cannot be altogether

1891

THE DWINA.

The President.

excused. This does not depend entirely upon the collision, for it is clear that the *Neva* got into a position into which she never ought to have been allowed to get, and the hawser ought to have been cast off long before it went under the *Dwina*. The manœuvres of the *Neva* were, therefore, not skilful, and I think it was wrong for the captain of the *Neva* not to establish communication between his vessel and the *Dwina* by means of a boat, as he had done before with ease with the jolly-boat and two men. Instead of that, the captain of the *Neva* chooses to adopt the course of starting from a position on the port quarter of the *Dwina*, and going round with the object of throwing the heaving-line as he was going by, the advantage being that, from the position he was trying to get into, he could throw the line with the wind instead of against it. He was warned that he was likely to collide with the *Dwina;* whereupon he put his engines full speed astern, and then again attempted a similar manœuvre with the result that a collision took place. I am advised by the Elder Brethren that, with the wind setting him down, that was an unseamanlike operation, and ought not to have been attempted in that way. The result of the manœuvre was that it did actual damage to the extent of 400*l.* or thereabouts to the *Dwina*, as well as causing delay in executing repairs. I do not intend to send this matter before the registrar and merchants, because I think it would needlessly add to the expense, and I am therefore going to form an estimate, though perhaps a rough one. If these services had been skilfully performed, having regard to the fact that there was no real danger necessarily incurred, and having regard to the state of the weather, I should have given 800*l.*; but taking all the circumstances into consideration with reference to the damages arising out of the collision, I shall deduct the sum of 400*l.*, and make an award of 400*l.*

Sir Charles Hall, Q.C., for the plaintiffs, asked for an apportionment amongst the respective claimants.

THE PRESIDENT. No; the estimate I have made is a rough one to save expense. If apportionment is insisted upon, I shall send the case to the registrar assisted by merchants, to accurately assess the damages.

1891

THE DWINA.

Sir Charles Hall, Q.C., did not insist upon the apportionment.

F. W. Raikes, for the defendants, submitted that the defendants were entitled to the costs of the counter-claim, as they had proved negligence on the part of the salvors, or that no costs should be given against the defendants, as 400*l.* had been deducted from the intended award of 800*l.*

THE PRESIDENT. No; the finding is, not that there was negligence, but that there was such want of skill as to diminish the amount of salvage. The award will be 400*l.*, with costs.

Solicitors for plaintiffs: *Rollit & Sons.*
Solicitors for defendants: *Pritchard & Sons.*

T. L. M.

Dec. 15.

THE DICTATOR.

Admiralty—Salvage—Action in rem—Practice—Amendment of Indorsement of Writ—Costs.

In an action in rem for salvage services rendered to a ship, her cargo, and freight, the plaintiffs indorsed the writ with a claim for 5000*l.*, and the owners of the ship, cargo, and freight gave an undertaking through their solicitor to put in bail for that amount.

The statement of claim, subsequently delivered, concluded with a claim in the usual form for "such an amount of salvage as to the Court may seem just."

At the hearing of the action, the Court made an award of 7500*l.* Thereupon, the plaintiffs, before the decree was drawn up, moved for leave to amend the indorsement of the writ by altering the sum named therein to 8500*l.*:—

Held, that the Court had power after judgment to give the required leave, and the Court ordered the indorsement of the writ to be amended by altering the amount named therein to 8500*l.*, the plaintiffs paying the costs of the motion.

MOTION by plaintiffs, after judgment, in an action of salvage for leave to amend the indorsement of the writ by increasing the amount claimed from 5000*l.* to 8500*l.*

The facts, so far as material, were shortly that:—

On November 12, 1891, the Gamecock Steam Towing Company and others issued a writ in rem, directed to the owners and parties interested in the steamship *Dictator*, her cargo, and freight, indorsed as follows:—

"The plaintiffs as the owners, masters, and crews of the steam-tugs *Woodcock*, *Eagle*, and *Stormcock*, claim the sum of

5000*l.* for salvage services rendered to the steamship *Dictator*, her cargo, and freight, during the present month of November."

As the solicitors acting for the owners of the *Dictator*, and on behalf of ship, cargo, and freight, gave an undertaking to appear, put in bail for that amount, and prove values, the ship was not arrested, nor was the discharge of the cargo interfered with.

On November 17, the statement of claim was delivered, which, after setting out the salvage services alleged to have been rendered by the above-named tugs to the *Dictator* on November 10, 11, and 12, in the English Channel, and in the River Thames, concluded with a claim in the usual form for "such an amount of salvage as to the Court may seem just."

On November 26, the action was tried before the President, with two of the Elder Brethren of the Trinity House as assessors. The Court came to the conclusion, on the evidence, that the *Dictator* was in considerable danger at the time two of the tugs took hold of her, as she had lost her propeller and could not get out of East Dungeness Bay, where she was at anchor, without assistance, and in view of the opinion of the Elder Brethren that, in the unusually heavy weather which subsequently came on, there was great probability that, if left where she was, the vessel would have gone ashore, and considering the large values at risk (viz., *Dictator* 47,500*l.*, cargo 121,840*l.*, freight 9860*l.*, total 179,200*l.*), the learned judge made an award of 7500*l.*, being 2500*l.* in excess of the sum indorsed on the writ.

Before the decree was drawn up the plaintiffs gave notice of motion to amend the indorsement of the writ as above stated.

Barnes, Q.C., and *Nelson*, for the plaintiffs, in support of the motion. A difficulty has arisen owing to the amount awarded exceeding the amount claimed by the writ. By Order XX., r. 4, of the Rules of the Supreme Court, 1883, the plaintiff may, in his statement of claim, alter or extend his claim without any amendment of the indorsement of the writ; but in a salvage action there is no amount mentioned in the statement of claim, the sum claimed appearing on the indorsement of the writ. By Order XXVIII., r. 1, the Court may, at any stage of the proceedings, allow an amendment of the indorsement, and in

1891

THE DICTATOR.

Wyatt v. *Rosherville, &c. Co.* (1), leave was given, after verdict, to amend the claim so as to cover the finding where the jury gave the plaintiff 300*l.* more than he had claimed.

The reason why the claim was not made sufficiently large in the first instance is stated in the affidavit, filed in support of the motion, to have been that the great value of the cargo on board the *Dictator* (121,840*l.*) was not at the time the writ was issued known to the plaintiffs' solicitors. [The following cases were referred to: *Griffiths* v. *London and St. Katharine Dock Co.* (2); *The Freedom* (3); *The Johannes.* (4)]

Sir Walter Phillimore, and *J. P. Aspinall,* for the defendants, the owners of the *Dictator.* Such an amendment has never been made in Admiralty practice, and, if made, it would be futile. The writ in rem, as now framed, combines in one instrument two separate documents previously in use, and, under the present practice, the action is not instituted in any specified sum, but an amount intended to include both the claim and costs is indorsed on the writ. For the amount so indorsed bail is usually given, and, in this case, the amount so intended to be indorsed was telegraphed to the defendants' solicitors, and then filled in on the writ forwarded to them. This determined the amount of the undertaking to give bail, which has been accepted as a substitute for bail. The result is that the undertaking to put in bail for 5000*l.* now stands in lieu of the lien on ship and cargo. The ship, in fact, was never arrested, and the cargo, which represented the greater part of the value, has been distributed to its various owners. No doubt the undertaking may be exhausted to meet the award to the extent of 5000*l.*, and the costs may be recovered, over and above, as a personal claim; but there are no means of obtaining more. The case of *Wyatt* v. *Rosherville, &c. Co.* (1), relied upon by the plaintiffs, is not in point, as the action was in tort, and no sum would be named in the indorsement on the writ. [The following cases were also referred to: *The Wild Ranger* (5); *The Kalamazoo* (6); *The Nostra Senora del Carmine.* (7)]

(1) 2 Times Rep. 282.
(2) 13 Q. B. D. 259.
(3) Law Rep. 3 A. & E. 495.
(4) Law Rep. 3 A. & E. 127.
(5) Br. & L. 84.
(6) 15 Jur. 885.
(7) 1 Spks. 303.

Barnes, Q.C., in reply.

1891

THE DICTATOR.

THE PRESIDENT (SIR CHARLES BUTT). I am quite satisfied that I have the power to give leave to make the amendment asked for. The order will be that the plaintiffs have leave to amend the indorsement of the writ by altering the sum therein named from 5000*l.* to 8500*l.* What the effect of that may be is another matter, which may have to be considered hereafter. As the granting of this application is discretionary, and the plaintiffs are seeking to amend a document of their own, they must pay the costs of the motion.

Leave to amend indorsement of writ.

Solicitors for plaintiffs: *Lowless & Co.*

Solicitors for defendants: *Wynne, Holme, & Wynne, for Simpson, North, & Johnson, Liverpool.*

T. L. M.

[DIVISIONAL COURT.]

Nov. 23.

THE EDEN.

Admiralty—Practice—Appeal from County Court—Amount decreed due under 50l.—County Courts Admiralty Jurisdiction Act, 1868 (31 *&* 32 *Vict. c.* 71), *s.* 31—*County Courts Act*, 1888 (51 *&* 52 *Vict. c.* 43), *s.* 120.

By s. 31 of the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), "No appeal shall be allowed unless the amount decreed or ordered to be due exceeds the sum of fifty pounds."

By s. 120 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), the party aggrieved by the judgment, direction, decision, or order of a county court judge in point of law or equity may appeal to the High Court.

In an Admiralty action for breach of charterparty brought in a county court by the plaintiffs, the owners of a steamship, against the defendants, the charterers' agents, the county court judge made a decree in favour of the plaintiffs for nominal damages, to wit, 1s. and costs.

The plaintiffs appealed to a Divisional Court of the Admiralty Division of the High Court.

On objection being taken by the defendants that there was no appeal, as the amount decreed did not exceed the sum named in s. 31 of the County Courts Admiralty Jurisdiction Act, 1868:—

Held, by the Divisional Court, that the appeal could be heard, as the language of s. 120 of the County Courts Act, 1888, was general in its terms, and therefore included an appeal from a final judgment of a county court judge in an Admiralty action.

APPEAL by the plaintiffs, the owners of the steamship *Eden*, against a decision of the judge of the county court of Durham, holden at Hartlepool, whereby the plaintiffs, in an action for

1891

THE EDEN.

breach of charterparty, were held only entitled to nominal damages, to wit, 1*s.* and costs.

The action was for 67*l.* 2*s.* 6*d.*, alleged loss sustained through cancellation of a charterparty entered into by the plaintiffs, Robert Ropner & Co., owners of the *Eden*, and the defendants, Alexander A. Adams & Co., as agents for charterers. The action was tried in the above-mentioned county court on March 6, 1891, and on June 29 the appeal came on for hearing; but the case was referred back for a statement of the reasons for the finding of the learned county court judge.

On November 23 it again came on for hearing, when the defendants took the preliminary objection that the appeal could not be heard, as the amount decreed to be due was below the statutory limit.

J. P. Aspinall, for the defendants, in support of the preliminary objection. As the plaintiffs only recovered 1*s.* damages, s. 31 of the County Courts Admiralty Jurisdiction Act, 1868 (1), prohibits an appeal, and in *The Cashmere* (2), Butt, J., inclined to the opinion that the County Courts Act, 1888, did not repeal or alter the provisions of the earlier Act of 1868.

F. W. Raikes, for the plaintiffs. A right of appeal is given by s. 120 of the County Courts Act, 1888. (3) The terms of the section are general, and, in substance, provide that any party in any action or matter may appeal. There is no qualification as to the amount decreed to be due. These general provisions in s. 120 of the Act of 1888 override the special provisions of s. 31 of the Act of 1868, just as in *The Hero* (4) it was held that the general provisions of s. 74 of the Act of 1888 overrode the special provisions of s. 21 of the Act of 1868.

(1) 31 & 32 Vict. c. 71, s. 31: "No appeal shall be allowed unless the amount decreed or ordered to be due exceeds the sum of fifty pounds."

(2) 15 P. D. 121.

(3) 51 & 52 Vict. c. 43, s. 120: "If any party in any action or matter shall be dissatisfied with the determination or direction of the judge in point of law or equity, or upon the admission or rejection of any evidence, the party aggrieved by the judgment, direction, decision, or order of the judge, may appeal from the same to the High Court, in such manner, and subject to such conditions, as may be for the time being provided by the Rules of the Supreme Court regulating the procedure on appeals from inferior courts to the High Court . . . ."

(4) [1891] P. 294.

1891

THE EDEN.

THE PRESIDENT (SIR CHARLES BUTT). I am of opinion that it is not competent for us to say that the express words of the 120th section of the Act of 1888 do not give a right to the suitor in the county court to appeal, although the amount recovered be under 50*l*.

It is quite clear that there are other matters of county court Admiralty jurisdiction, as well as of general county court jurisdiction, dealt with in that Act, and dealt with in the same section, where neither the Admiralty Court nor the county court holding Admiralty jurisdiction is expressly referred to.

The question is, do not some of the sections, and does not this particular s. 120, deal by implication with the question of appeals in Admiralty causes.

My opinion is that, in the absence of anything to the contrary in the Act itself, we must give effect to s. 120 of this Act, and hold that an appeal may properly be brought.

JEUNE, J. I am of the same opinion. It appears to me that we are only repeating the judgment in the case of *The Hero* (1); at any rate, my view is exactly the same as stated in that case, that where you have positive words, which there seems no reason whatever to doubt, full effect ought to be given to them.

J. P. Aspinall, for the defendants, asked for leave to appeal to the Court of Appeal.

THE PRESIDENT. Yes.

Preliminary objection overruled.

The appeal was then heard on the merits, and, in the result, the finding of the learned county court judge as to the damages was set aside, and, by consent, the case was sent back to the county court for a reference before the registrar as to the amount of the damages, unless the parties agreed upon such amount beforehand.

Solicitors for plaintiffs: *Turnbull, Tilly, & Mousir, for Turnbull & Tilly, West Hartlepool.*

Solicitors for defendants: *Botterell & Roche, for Harrison & Barker, West Hartlepool.*

(1) [1891] P. 294.

1891
Dec. 10, 11.

THE CAPELLA.

Admiralty—Salvage—Misconduct of Salvors—Forfeiture of Reward.

A vessel drove ashore in a gale of wind. Part of the crew landed in their own boat, whilst the remainder were taken off by the lifeboat stationed at that part of the coast, for which service the crew of the lifeboat (the plaintiffs) were remunerated in the usual way. On landing, the master of the vessel went off in search of tugs, leaving the officer of the coastguard, with the mate and crew of the vessel, to watch her. As nothing could then be done, the mate and crew went to an inn for food and to dry their clothes. After some hours the weather moderated, and the plaintiffs, in spite of the remonstrance of the officer of the coastguard, put off in a boat to the vessel, at the same time forcibly preventing the mate and two of the crew from going in the boat with them. On reaching the vessel, the plaintiffs took possession of her, as if salvors of a derelict, and when the tide ebbed, leaving the vessel high and dry, they laid two anchors out on the sands, by means of which, as the tide rose they turned the vessel's head seaward.

The master of the vessel subsequently arrived with tugs; but on rowing to his vessel and attempting to haul himself up the side, he fell back into the boat as one of the plaintiffs let go the rope.

The tugs then got hold of the vessel and towed her towards a neighbouring port; but, through the incapacity of the plaintiffs, she took the ground and had to be towed to sea again. A pilot subsequently boarded her; but, owing to the inefficiency of the plaintiffs in carrying out his orders, considerable delay occurred before the vessel was ultimately brought into a place of safety.

In an action of salvage against the owners of the vessel:—

Held, that the suit must be dismissed with costs, as the vessel was not derelict, and the misconduct of the plaintiffs was such as to work a total forfeiture of salvage reward.

ACTION OF SALVAGE.

The plaintiffs were Charles Lee and others, the coxswain and crew of the lifeboat stationed at Worthing. The defendants were the owners of the *Capella*.

The material facts were as follows:—

On November 11, 1891, about 9 A.M., the *Capella*, an iron German barque of 504 tons register, manned by a crew of twelve hands, on a voyage from Marseilles to the Tyne in ballast, drove ashore at West Worthing in a heavy S.W. gale. Five of the crew landed in their own boat; the remainder were taken off in the lifeboat manned by the plaintiffs; and as the plaintiffs received for this service the usual remuneration awarded by the lifeboat institution, the present action was irrespective of this part of the service.

Immediately on landing, the master of the *Capella* requested the chief officer of the coastguard to watch the ship for him, to put, as soon as practicable, the mate and crew of the *Capella* on board, and otherwise to do what was necessary for the protection of the vessel whilst he went to Shoreham to engage tugs to tow his vessel off.

As nothing could be done till the weather moderated, the mate and crew went to an inn to obtain food and dry their clothes; but about 10 P.M., as the wind and sea had somewhat decreased, and the *Capella* had driven a short distance higher up to the eastward, the plaintiffs prepared to go off to her. The chief officer of the coastguard thereupon informed them that he and the mate of the *Capella* were in charge of the vessel, and that the services of the plaintiffs were not required. The plaintiffs, however, proceeded to get a boat out; and on the mate and two of the crew of the *Capella* getting into her for the purpose of proceeding to their vessel, the plaintiffs forcibly ejected them, and, launching the boat, went off to the *Capella* and took possession of her. As the tide ebbed, the vessel was left high and dry, and the plaintiffs with the aid of horses, laid out the port and starboard anchors on the sands, so that on the tide rising, a strain being kept on the cables, the head of the *Capella* was brought round to the S.W.

In the meantime, the master of the *Capella* had engaged at Shoreham two tugs for the sum of 250*l.* to tow the *Capella* off, and about 6 A.M. on the 12th he arrived off Worthing in one of the tugs (the *Mistletoe*), accompanied by the other tug (the *Stella*), and having with him extra hands in case the crew of the *Capella* had been unable to get on board their vessel. He proceeded in a boat belonging to the *Mistletoe*, with some of the men engaged by him, to the *Capella*, and proceeded to board her; but on attempting to haul himself up by a rope hanging over the side, one of the plaintiffs who was holding the bight in his hand, let it go, and the master, falling back into the boat, was obliged to return to the *Mistletoe*.

The two tugs then endeavoured to make fast. At first the plaintiffs refused to take the ropes; but ultimately both tugs got hold of the vessel, and, the anchors of the *Capella* having been

1891

THE CAPELLA.

slipped by the plaintiffs, the two tugs towed the *Capella* off the beach and towards Shoreham. The plaintiffs, however, neglected to take the sea tackle off the rudder, so that the vessel steered with difficulty, and on attempting to tow her into the harbour she grounded at the entrance. By the time the vessel was towed off, there was not enough water for her to enter, and thereupon the tugs proceeded to tow her to another harbour.

About 3 A.M. on the 13th, a pilot boarded the *Capella* off Newhaven; but as the plaintiffs could not inform him how much water she was drawing, he did not venture in the then state of the tide to take the vessel in; she was therefore kept outside the harbour for some time, and was in great danger of drifting ashore, as the plaintiffs were not capable of efficiently obeying his orders as to working the ship and setting more sail. Eventually, about 5 A.M., the *Capella* was towed into Newhaven and safely berthed.

The plaintiffs, by their statement of claim, alleged that the *Capella* "was left a derelict by her crew," and but for their services would have broken up and been a total loss. This the defendants by their defence denied, and submitted that in the circumstances the plaintiffs were not entitled to any salvage reward; but a further charge against the plaintiffs, that they wrongfully took from the *Capella* a spirit compass and tobacco, cigars and spirits belonging to the defendants, and some clothes belonging to the crew, was not pressed, as the evidence shewed that a number of persons besides the plaintiffs got on board the vessel whilst she was lying high and dry on the beach at Worthing.

The value of the *Capella* was 3000*l.*

Gainsford Bruce, Q.C., and *F. W. Raikes*, for the plaintiffs. The services of the plaintiffs were valuable, as, by the laying out of the anchors in the right direction and hauling on the cables as the tide rose, the vessel was prevented from driving further up the beach and so becoming a total wreck. Her head also was turned seaward, so that the tugs when they arrived could tow her off without difficulty. They subsequently worked the ship, and carried out the orders of the pilot to the best of their ability, and in the result the vessel was rescued from a position of great danger and finally placed in safety.

1891

THE CAPELLA.

As to the alleged misconduct, the mate and the two men who tried to get into the boat belonging to the salvors might have gone off to the vessel in their own boat, and the salvors did not prevent them from so doing, but only refused to take them in the boat belonging to the salvors. Even if this should be deemed misconduct, still the case of the *Yan-Yean* (1) shews that it would only work a partial forfeiture of the reward. As to the subsequent conduct of the salvors, it arose from a bonâ fide though mistaken view of their position. The captain having left Worthing, and the mate and crew having left the beach, they regarded the vessel as abandoned, and when they got possession of her they thought they were entitled to retain it until they had brought the vessel into a place of safety. If the Court considers that it has been proved that the master of the *Capella* was prevented from boarding the vessel, still that was the momentary act of one only of the salvors, and would not disentitle the rest to a reward. In any event, misconduct only goes to quantum, and not entirely to deprive salvors of their claim for services rendered.

Sir Walter Phillimore, and *Stubbs*, for the defendants, were not called upon.

THE PRESIDENT (SIR CHARLES BUTT). [After referring to the services of the plaintiffs in bringing off part of the crew in the lifeboat, proceeded:] What I have to deal with is the question whether they are entitled to any salvage remuneration for the services alleged to have been subsequently rendered to this vessel. Now, if there had been any question here of awarding something for salvage, I should have availed myself of the assistance of the Elder Brethren with reference to the extent of danger both to the property, and, if there were any, to the lives of the people rendering the services. I think that some nice questions would probably have arisen on that as to the manœuvring of this vessel at different stages of the transaction. But I am clearly of opinion that the misconduct of the salvors has been such as to disentitle them to any salvage remuneration whatever. The ship grounded on the beach at Worthing somewhere about 9 o'clock on the

(1) 8 P. D. 147.

1891

THE CAPELLA.

The President.

morning of the 11th of last month. She remained there during the day, not in the position in which she first took the ground, for it appears she moved some distance along the beach, and probably a little in towards the shore. At about 9 or 10 at night she was hard and fast on the ground. The tide was ebb, and, as a matter of fact, by the time it was low water the vessel herself was comparatively high and dry, and there was a considerable stretch of dry sand out beyond her, on which the anchors were laid. Now, there is really no pretence for the allegation made in the pleadings that this ship was derelict. Such a proposition, as is very well known, depends for one thing on the question whether there was any animus revertendi on the part of the officer in command of the ship. The evidence in this case is all one way. The crew were at an inn, the chief officer was there with them, and the ship had been left by the captain (who went on to Shoreham) with instructions to the crew to go off to the ship as soon as it was practicable, and, if necessary, to let go the anchor. The purpose of the captain's leaving was this: There appear to have been no tugs available at the locus in quo, and he had to go to Shoreham, a distance of five or six miles. He went to Shoreham, and engaged two tugs for 250*l.* to tow the ship off the beach; and not being certain whether his own crew would have been able to get back on board, he took the precaution of bringing with him with the tugs from Shoreham eight men to assist him on board in case his own crew should not be there. Meantime the plaintiffs went off to the ship in a boat before the water had left her dry, and when, as I understand, there was not only some sea, but rather a rough sea. There was absolutely no need to go off to the vessel at that time. The plaintiffs themselves have admitted that the real object of going off was to take possession of the ship and prevent other people getting it. As they were going off, the chief officer of the coast-guard came down to them, and told them that their services were not required; that he himself had undertaken to do that which they were proposing to do, and their assistance was wholly unnecessary. What was it they did after all? Why, they went out to the ship; they could do nothing practical when they were there; they waited till the tide ebbed and the ship was high and

dry, and then they took out two anchors. It was a very simple operation. Can anyone doubt that if they had not done it the officer of the coastguard would have done it? But here comes what I consider the most important part of the story. As these men were getting into their boat to go off to this ship, the mate and two of the crew of the ship came down and got into the boat also to go off to the ship. They were told that they must not go, and they were taken and bundled out of that boat. It is said that that is not misconduct which ought to affect the salvage. It is unnecessary to say whether it is or is not of itself. But let us see what follows. In the course of time the captain arrived with two tugs from Shoreham. The *Mistletoe*, the tug in which he was, got up first; the master and four men got into the boat. They went to the *Capella*. They told the plaintiffs that he was the captain of the ship, and were answered that they would not have the captain or anyone else on board. The captain then had himself rowed round to the other side of the ship, and was proceeding to get on board his own ship by the assistance of a rope which was hanging down the side, when the rope was cast off by one of the plaintiffs and he dropped down a distance of six or seven feet into his boat, and was refused admittance to his own ship. Moreover, it rather appears that they not only refused to take the captain on board, but said they would have nothing to do with a pilot. The master of the *Mistletoe*, who was also a pilot, offered to go on board, but they swore at him and threatened him. The result is, that the tugs ultimately took this vessel away with neither her captain nor any of her crew on board; so that when little difficulties arose there was no one to give the necessary information. Whether or not that had anything to do with the danger which the ship afterwards incurred, the conduct of the plaintiffs was wholly and utterly unjustifiable, and I can scarcely speak too strongly in reprehension of it.

I dismiss this suit, and order the plaintiffs to pay the costs.

Solicitors for plaintiffs: *Ravenscroft, Hills, & Woodward, for Melvill Green, Worthing.*

Solicitors for defendants: *Stokes, Saunders, & Stokes.*

T. L. M.

1892
Jan. 13.

[DIVISIONAL COURT.]

THE HIGHLAND CHIEF.

Admiralty—Seamen's Wages—Disrating by Master—Deductions—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *s.* 171.

By s. 171 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), "every master shall . . . . before paying off or discharging any seaman, deliver to him . . . . a full and true account, in a form sanctioned by the Board of Trade, of his wages and of all deductions to be made therefrom on any account whatever . . . . and no deduction from the wages of any seaman . . . . shall be allowed unless it is included in the account so delivered. . . ."

The plaintiff signed articles to serve on board the defendants' vessel as refrigerating engineer at 10*l.* per month. He so served for two months, at the end of which time the master of the vessel, on account of alleged drunkenness and unfitness, disrated him, and placed him in the main engine room, at wages reduced to 7*l.* per month for the remaining period of one month and eighteen days during which the voyage lasted.

In the account of wages on the Board of Trade form, the master filled in the date when the wages began, the date when they ceased, the total period of employment, and in the column headed "Earnings," entered, "Wages at 10 and 7 per month—two months at 10*l.*—20*l.*," and then filled in the final balance less cash advances.

In an action for wages, brought by the plaintiff against the defendants in the Liverpool Court of Passage, the defence raised of justification for the disrating on account of drunkenness and unfitness was not gone into, but judgment was entered for the plaintiff on the ground that the account delivered by the defendants was insufficient, as there was no entry in the column headed "deductions" of the amount of wages forfeited by reason of the reduction consequent on disrating:—

Held, by the Divisional Court, that the case must be sent back to be retried, as the reduction in the amount of wages consequent on disrating was not a "deduction" requiring to be entered under that column in the Board of Trade form.

Per Jeune, J. The matters coming under the head of "forfeitures" in the column of deductions in the Board of Trade form are such offences as are enumerated in s. 243 of the Merchant Shipping Act, 1854, and the word "deductions" refers to matters of such kind as sums deducted for families under s. 192, or for medical attendance under s. 228, sub-s. (4).

Semble, the master has the power, and is the proper person, if circumstances require it, to disrate.

APPEAL by defendants, the owners of the steamship *Highland Chief*, against a decision of the judge of the Liverpool Court of Passage, entering judgment for the plaintiff, in an action of

1892

THE HIGHLAND CHIEF.

wages, on the ground that the account of wages delivered by the defendants was insufficient.

The material facts were shortly that—

On October 26, 1890, the plaintiff, Benjamin Carr, shipped on board the defendants' vessel *Highland Chief* as refrigerating engineer, and signed articles for a voyage to the River Plate, Ensenada, thence to Las Palmas, back to Ensenada, and thence to England at 10*l.* per month.

On December 26 the master, on the ground of alleged drunkenness, neglect of duty, and unfitness, disrated the plaintiff, placed him in the main engine room, and reduced his wages to 7*l.* per month.

On February 12, 1891, the voyage terminated, and the master delivered to the plaintiff an account of wages on the form issued by the Board of Trade.

This account shewed the date when the wages began, the date when the wages ceased, the total period of employment (three months, eighteen days), and under the heading "Earnings" there was an entry of wages at 10 and 7 per month—two months at 10*l.*—20*l.*; and the final balance was stated to be 29*l.* 13*s.* 4*d.*, being the total earnings, 31*l.* 4*s.*, less cash advances 1*l.* 10*s.* 8*d.*

The sum of 29*l.* 13*s.* 4*d.* was tendered by the defendants to the plaintiff and refused by him; and on February 19 the plaintiff commenced an action in the Liverpool Court of Passage against the owners and parties interested in the *Highland Chief* for 44*l.* 9*s.* 4*d.*, for wages, maintenance, and expenses, being 36*l.*, less 1*l.* 10*s.* 8*d.* advances, for wages from October 26, 1890, to February 12, 1891, and 10*l.* damages for detention. The defendants appeared, and by their defence alleged (inter alia), that "during the said voyage and previously to December 26, 1890, the plaintiff had on several occasions been drunk whilst on duty, and had by reason of his drunken habits been unfit on several occasions to carry out his duty properly, and had been guilty of neglect of duty, and had shewn himself to be entirely unfit for the post of refrigerating engineer," and that "in consequence of such drunkenness and drunken habits, and neglect of duty and unfitness, the master of the *Highland Chief*, in pursuance of his duty, on December 26, 1890, disrated the plaintiff."

1892

THE HIGHLAND CHIEF.

In their particulars of neglect of duty and unfitness, delivered pursuant to order, the defendants alleged (inter alia) that "while the ship was at Las Palmas, the plaintiff, by reason of his ignorance of the details of the said machinery and by reason of his carelessness and negligence, was quite unfit and incompetent to carry on his duties as refrigerating engineer, and on more than one occasion made serious mistakes in the management of the said refrigerating machinery, and would, if he had been left to himself, have caused serious injury to the said machinery and to the cargo of meat which was loaded on board the said ship."

On May 23, the action came on for trial, when the learned judge ruled that, of the three defences, (1.) drunkenness, (2.) incompetency from drunkenness, (3.) incompetency, apart from drunkenness, the defendants were not entitled on the pleadings to go into incompetency apart from drunkenness, and on the production of the account of wages, and objection taken by the plaintiff's counsel to its insufficiency, the learned judge gave judgment for the plaintiff on the ground that the account of wages was not in accordance with s. 171 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104) (1) as it did not shew the change in the rate of wages as a "deduction."

On appeal,

Joseph Walton, for the appellants (defendants). It sufficiently appears from the entries on the form that the wages of the plaintiff were at 10*l.* per month for two months and at 7*l.* per month for the remaining period of one month and eighteen days. An entry of the cause of disrating and of the consequent reduction of wages is entered in the official log, and being a *re*duction of the wages and not a *de*duction from the wages, it is not necessary to enter it in the column headed "Deductions." [He was stopped by the Court.]

Carver, for the respondent (plaintiff). The learned judge in

(1) 17 & 18 Vict. c. 104, s. 171: "Every master shall .... before paying off or discharging any seaman, deliver to him .... a full and true account, in a form sanctioned by the Board of Trade, of his wages and of all deductions to be made therefrom on any account whatever .... and no deduction from the wages of any seaman .... shall be allowed unless it is included in the account so delivered. ...."

1892

THE HIGHLAND CHIEF.

the Court below was of opinion that the account should be such as to give a seaman reasonable information, and that this account did not do so, as it omitted to state under the head of "deductions" the change made in the rate of wages from the rate agreed upon in the articles. The reduction in the wages was a forfeiture of part of the agreed wages, and therefore an entry of it should have appeared in that part of the account of wages appropriated to deductions for forfeitures. No notice of the reduction in wages was given to the plaintiff until two days before the arrival of the ship.

[THE PRESIDENT. We cannot go into that question now, as the only matter before the Court is whether the entries in the account have been made in accordance with the provisions of the statute.]

The articles give the master the power to make certain forfeitures for drunkenness, but do not give him the power to disrate. He cannot alter the contract made by the articles except under the conditions specified in the articles.

[THE PRESIDENT. I always thought the master was the proper person to disrate; but the propriety of the disrating is still open to you in the Court below.]

Forfeitures for misconduct are a form of punishment which, on conviction, are in the province of the Court, not of the master. In s. 243, sub-s. 2, of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), the words are "and also, *at the discretion of the Court*, to forfeit out of his wages," &c., and similar words occur in the other sub-sections dealing with various offences, and it is clearly the Court that is referred to in s. 254, where the words are: "Any question concerning the forfeiture of, or deductions from, the wages of any seaman or apprentice, may be determined in any proceeding lawfully instituted with respect to such wages. . . ."

The entry in the official log does not help the defendants, as it was not made as soon as possible after the occurrence, in accordance with the provisions of s. 281 of the Act of 1854.

[THE PRESIDENT. We must assume for the purposes of to-day that the reduction was properly made.]

Joseph Walton, in reply. As judgment was given in the Court below on the point of law arising during the examination of the

1892

THE HIGHLAND CHIEF.

plaintiff, the defendants have had no opportunity of adducing any evidence, and, therefore, ask that the case may be sent back, but with an intimation that the ruling of the learned judge in the Court below was wrong on the point that the defendants could not, on the pleadings as they stand, give evidence of incompetency apart from drunkenness. It is submitted that the wording of the defence, coupled with the explanations in the particulars, clearly give notice that the question of unfitness, apart from drunkenness, is intended to be relied on as one of the grounds of defence.

THE PRESIDENT (SIR CHARLES BUTT). The only question for us to decide to-day is, whether the defence fails by reason of the insufficiency of the account. It is said by the learned counsel for the defendants that the propriety of the disrating—that is to say, the sufficiency of the cause assigned by the captain, and the question whether the disrating was properly done—are matters which cannot be finally decided by this Court, because the evidence required to be given in the matter was not adduced before the learned judge. All these questions are open, therefore, to the plaintiff on the case going back to the Court below, as it must go. The only question I am called upon to decide is, whether, assuming these matters in favour of the defendants, this is a sufficient account. Now, what happened? The man entered on his duties. It is alleged that he was drunk, and incompetent to perform them. It is a very serious matter when you come to deal with machinery, because it might at any moment occasion disaster which would wreck the ship and sacrifice the lives of all on board. The master, finding this state of things, disrated the man—that is, reduced his wages by 3*l.* a month, telling him so at the time, and taking him off some of his duties. That is a matter which is contemplated in the articles which formed the agreement between the parties. The question Mr. Carver raised is, who is to disrate? Well, it is very true that the contract does not distinctly state the person who is to perform the act of disrating or reduction; but can it be said that it is anybody but the master, or, in his absence—as if, for example, he is ill—the person in command of the ship? My belief is, that the person who

1892

THE HIGHLAND CHIEF.

The President.

performs this operation always is the master of the ship. He has done it here, I think, in accordance with the contract; and I do not think, on that assumption, that the 3*l.* less per month which the man received from that time is a matter of such deduction as is mentioned in the printed form supplied by the Board of Trade. I think that the moment the disrating had been properly made, assuming it was properly made, the man's wages were 7*l.* a month, and not 10*l.*; and that difference of 3*l.* a month does not come within the meaning of deductions in the Board of Trade form. I, therefore, hold that the learned judge was wrong in his decision that this was an insufficient account.

JEUNE, J. I am of the same opinion. If the case goes down, as it must go down, to the Court below, it will be open to the plaintiff to shew that the disrating was not within the terms of the contract, or that, on the true facts of the case, there was nothing to justify the master in making it. The only question for us is whether the account that was furnished was within the 171st section of the Merchant Shipping Act, 1854. That says two things. In the first place, there is to be a full and true account of the wages. In this case I think there was, because the effect of disrating was to reduce the wages, and that reduction is shewn in the account. Then the section requires that a true and full account of deductions made from the wages is to be included in the account. The form of the Board of Trade divides these deductions into two heads—forfeitures and other deductions. Forfeitures, it appears to me, point to such matters as are referred to in the 243rd section of the Act. Deductions point to such matters as sums deducted for families under the 192nd section, or sums deducted for medical expenses under s. 228, sub-s. (4), and other matters of that kind; but neither of them appear to me to fall within what ought to be understood by a reduction of wages through disrating. It is said that there can be no such thing as disrating by the master. It appears to me clear, after what the President has said, and looking at the authorities collected in *Maclachlan* (1), that disrating is to be

(1) Maclachlan on Merchant Shipping, 3rd ed. pp. 204, 220, 226, 227, 231, 238, 244, 245.

1892

THE HIGHLAND CHIEF.

Jeune, J.

done by the only man in a position at the time to decide the matter, namely, the master. The other point appears to me to be equally clear, that on the pleadings, as they stand, it was open to give evidence as to the question of unfitness apart from unfitness through drunkenness.

The PRESIDENT. I did not deal with the latter point in my judgment, but I entirely agree with my learned brother's observations. The appeal will be allowed, the decree of the Court of Passage set aside, and the cause remitted to be tried on the points other than that decided. Costs to be costs in the cause.

Appeal allowed.

Solicitors for the appellants (defendants): *Rowcliffes, Rawle & Co., for Lightbound & Dobell, Liverpool.*

Solicitors for the respondent (plaintiff): *Hamlin, Grammer, & Hamlin, for J. P. Cartwright & Co., Liverpool.*

T. L. M.

1892

Jan. 12.

IN THE GOODS OF JAMES LEIGH.

Probate—Torn Will—Incomplete Restoration—Copy—Grant.

The will of a testator was, after his death, torn into pieces by one of his sons while a copy was being made by the executor. Most of the pieces were recovered and gummed together; but there were still some blanks left, and it was in an incomplete form when presented for probate, though the copy shewed what all the words omitted in the blanks had been:—

Held, that probate might be granted of the incomplete will and the copy as together constituting the will of the deceased.

APPLICATION for probate.

James Leigh, late of Bury, in the county of Lancaster, died on August 17, 1891, having duly executed his last will and testament on August 11, 1891. The will was read over after the funeral of the deceased by Mr. F. W. Baggally, one of the executors. On August 23, Frederick Leigh, one of the sons of the testator, went to Mr. Baggally and asked for a copy of the will, and Mr. Baggally thereupon proceeded to make a copy; but, before he had finished it, Frederick Leigh snatched the will out of his hands and tore it into pieces. Mr. Baggally collected the

pieces and gummed them together as well as he could; but when he had put together all the pieces he could recover there were still some blanks left in the will. 1892 IN THE GOODS OF LEIGH.

B. Deane, on behalf of the executors, moved the Court to admit the will to probate, and for directions to the registrar to fill in the blanks from the copy which Mr. Baggally had since completed. There are cases in which a lost will has been admitted to probate where the contents have been supplied entirely from memory; but there are no cases reported in which blanks in a will have been filled in.

JEUNE, J. This seems to me to be an a fortiori case. If you can supply the whole of a lost will by evidence from memory why should you not supply part of an incomplete will which has been partly destroyed when you have evidence in the form of a copy which has been made at the time? I think the best course will be to grant probate of both the documents, and to include both the will as gummed together and the copy in the probate as together constituting the will of the deceased.

Solicitors: *Grundy, Izod, & Grundy.*

W. L.

IN THE GOODS OF GEORGE ASHTON. *Jan.* 26.

Probate—Will—Construction—Appointment of Executors—"My Nephew G. A."—Legitimate and illegitimate Nephews of same Name—Extrinsic Evidence.

A testator by his will appointed four executors, one of whom was described as "my nephew G. A." It appeared that there were two persons named "G. A."—one an illegitimate son of the testator's sister, the other the legitimate son of the testator's brother. The testator also nominated as another of his executors "my nephew E. A.," and it appeared that E. A. was his illegitimate grand-nephew, the son of his illegitimate nephew. He further described as "my niece" a person who was his illegitimate niece:—

Held, that the language of the will shewed that the testator applied the description of nephew and niece to legitimate and illegitimate relatives indiscriminately; and that the Court was therefore entitled to admit extrinsic evidence for the purpose of shewing that the illegitimate and not the legitimate nephew was intended by the will.

MOTION for probate.

The testator in this case left a will duly executed by which he

1892

IN THE GOODS OF ASHTON.

appointed four executors. Two of them he described as his nephews, viz., "my nephew George Ashton," and "my nephew Esau Ashton." There was a "George Ashton," the illegitimate son of his sister, and Esau Ashton was his son, and there was also a "George Ashton" who was a legitimate nephew, being the son of testator's brother. The only question in the case was whether parol evidence could be received to shew that the testator intended to nominate his illegitimate nephew as executor; and it was agreed that if such evidence were admissible there could be no doubt that the intention of the testator was to appoint the illegitimate nephew. It also appeared that the testator had in the will described as "my niece" a person who was his illegitimate niece.

It was agreed between the parties that, to save expense, the question should be decided on motion.

B. Deane, (*Rawlins*, with him), moved that probate be granted to George Ashton, the illegitimate nephew, and Esau Ashton.

The question is whether evidence can be received to shew that the applicant was "my nephew George Ashton" whom the testator intended to benefit. It is admitted that if such evidence can be adduced the applicant is undoubtedly the person whom the testator had in view. In *Grant* v. *Grant* (1) it was held that the word "nephew" included a man's wife's nephews as well as his own, and that parol evidence might be given to shew which was intended. In *In re Wolverton Mortgaged Estates* (2), where there were two persons coming within the description of the will, evidence was also admitted. "Nephew" is not a word which involves legitimacy in the same manner as the word "children"; for although a man may be presumed to know who his own children are, he is not to be presumed to know all about the children of his brothers and sisters and of his wife's brothers and sisters. In *Charter* v. *Charter* (3) Lord Cairns said that the Court had a right to ascertain all the facts which were known to the testator when he made his will, and to place itself in the testator's position; and in *In re Joddrell* (4), it was held that

(1) Law Rep. 2 P. & D. 8; Law Rep. 5 C. P. 380, 727.
(2) 7 Ch. D. 197.
(3) Law Rep. 7 H. L. 364.
(4) 44 Ch. D. 590; [1891] A. C. 304.

1891

IN THE GOODS OF ASHTON.

where a testator had spoken of beneficiaries who were illegitimate as his "cousins," the Court was entitled to hold that the word "relatives" included illegitimate as well as legitimate relatives. Here the testator has described as "my niece" a person who was illegitimate, and as "my nephew" a person who was his illegitimate grand-nephew.

R. H. Pritchard, on behalf of the legitimate nephew. To admit evidence of the intention of the testator in the present will would be to go further than any previous case. It has never been held that the word "nephew" can extend to persons of illegitimate descent. *Grant* v. *Grant* (1) was disapproved by Sir G. Jessel, M.R., in *Wells* v. *Wells* (2), where he held that if a word has a primary signification those who allege that the testator used it in another signification cannot prove their case by evidence extrinsic to the will, and preferred to follow *In re Blower's Trusts* (3), where Mellish, L.J., held nephews and nieces to mean primâ facie brothers' and sisters' children, rather than *Grant* v. *Grant*. (1) *In re Wolverton Mortgaged Estates* (4) merely goes to shew that Malins, V.C., thought that "Thomas" and "Tom" meant the same thing, and that parol evidence could be admitted to shew who was intended by the testator; but unless it is held that "nephew" may mean a legitimate as well as illegitimate relative, the case does not apply. In *Merrill* v. *Morton* (5), Malins, V.C., also refused to follow *Grant* v. *Grant* (1), and preferred to follow *Wells* v. *Wells*. (2) There is no ambiguity here, because there is only one person who answers to the words of the will.

[He referred also to *Smith* v. *Lidiard* (6), and *Sherratt* v. *Mountford*. (7)]

B. Deane, in reply. As to the authority of *Wells* v. *Wells* (2), Sir G. Jessel says that the expression "nephews and nieces" must be understood in its primary sense—unless there is something in the context to give the words a different meaning—and here the references to the grand-nephew and the niece shew that the

(1) Law Rep. 2 P. & D. 8; Law Rep. 5 C. P. 380, 727.
(2) Law Rep. 18 Eq. 504.
(3) Law Rep. 6 Ch. 351.
(4) 7 Ch. D. 197.
(5) 17 Ch. D. 382.
(6) 3 K. & J. 252.
(7) Law Rep. 8 Ch. 928.

1892

IN THE GOODS OF ASHTON.

testator meant that the word should include an illegitimate relative.

JEUNE, J. The case has been well argued, and although on one point, if it were the only one, I should have wished to look further into the authorities, on another point there appears to me to be no great doubt. The question is whether where the testator speaks of his "nephew" he must be held to be speaking of an illegitimate or of a legitimate nephew, and whether you can call in parol evidence to shew which of the two he intended. Two points are to be kept quite separate. The first point is whether in the word "nephew" per se there is a latent ambiguity which will entitle us to inquire whether by the word the testator meant his legitimate or illegitimate nephew. If the matter turned upon that point alone, although I have an opinion, I should have expressed it with much hesitation, because it appears to me there is considerable conflict of authority. The question is, can one say that the word "nephew"—though in its primary sense applicable to a legitimate nephew only—may be properly applied, in its ordinary and popular sense, to illegitimate as well as legitimate relatives? If it can, then there is a latent ambiguity, and parol evidence may be introduced. There is a conflict of authority as to how the word "nephew" may be read. There is the case of *Grant* v. *Grant* (1), which was heard three times. Lord Penzance, the Court of Common Pleas, and the Court of Exchequer Chamber all held that the word, although in its primary sense importing consanguinity, might in the secondary sense mean affinity, and that parol evidence could be adduced to shew which was intended. If that be so, and if "nephew" can be used in so general a sense as to include both consanguinity and affinity, it might fairly be said to include both legitimate and illegitimate nephews and nieces. But the difficulty is that *Grant* v. *Grant* (1) does not appear to have been unchallenged. It must be admitted that the late Master of the Rolls in *Wells* v. *Wells* (2) disapproved of the decision in *Grant* v. *Grant* (1). But, speaking with the profoundest deference of the decision of so

(1) Law Rep. 2 P. & D. 8; Law Rep. 5 C. P. 380, 727.
(2) Law Rep. 18 Eq. 504.

great a judge, it may be doubted whether the two decisions of the Court of Appeal which he preferred to *Grant* v. *Grant* (1), namely, *In re Blower's Trusts* (2) and *Sherratt* v. *Mountford* (3), are really opposed to that case. Indeed, in the latter case, James, L.J., appears to refer to *Grant* v. *Grant* (1) with approval. It must be admitted also that Malins, V.C., in *Merrill* v. *Morton* (4), seems to have preferred to follow Sir G. Jessel rather than *Grant* v. *Grant*. (1) I do not think that is weakened by the observation that Malins, V.C., admitted the principle of interpretation of *Grant* v. *Grant* (1) in *In re Wolverton Mortgaged Estates* (5), because all he held there, I think, was, that the words "Thomas" and "Tom" being synonymous there was a latent ambiguity which was to be explained. You have, therefore, the authority of Sir G. Jessel and Malins, V.C., one way, and *Grant* v. *Grant* (1), and I think *Sherratt* v. *Mountford* (3), the other. Under these circumstances, if I had had to decide the question on that point, I should have followed *Grant* v. *Grant* (1), partly because of the great number of judges who concurred in it, and partly because the decision commends itself to my own mind. But I do not wish to put my decision on that point. There is another point which seems to me stronger. In this will the testator, to use the language of Lord Cairns in *Hill* v. *Crook* (6), has made us a dictionary. If he had done it in terms, there would have been nothing more to be said; but he seems to me to have done it practically, because he has used the word "nephew" where it clearly meant an illegitimate grand-nephew, and he has also described as his "niece" a person who was his illegitimate niece. He has made his dictionary for us in an unambiguous way, and if we are entitled to use that dictionary it makes the case clear. But are we entitled to use it? There is a conflict of judicial authority on this point; but I think it is clear on which side the preponderance lies. The case of *Hill* v. *Crook* (6) may itself be referred to, but other cases seem to me nearer to the present. In *In re Blower's Trusts* (2) I think the Court of

(1) Law Rep. 2 P. & D. 8; Law Rep. 5 C. P. 380, 727.
(2) Law Rep. 6 Ch. 351.
(3) Law Rep. 8 Ch. 928.
(4) 17 Ch. D. 382.
(5) 7 Ch. D. 197.
(6) Law Rep. 6 H. L. 265, 285.

1892

IN THE GOODS OF ASHTON.

Jeune, J.

Appeal expressed an opinion that the words "nephews and nieces" might be understood in a sense more general than their primary sense if there was anything in the language of the testator to shew he intended such a construction. On the other hand, in *Wells* v. *Wells* (1), the late Master of the Rolls, following the decision of Wood, V.C., in *Smith* v. *Lidiard* (2), held that "you cannot import the secondary meaning of the word into the residuary gift merely because it has been used in the former part of the will." It is true that in *Merrill* v. *Morton* (3) Malins, V.C., also followed *Smith* v. *Lidiard* (2); but that learned judge intimated that if he were unfettered by authority he should have come to a different conclusion on the point. But then comes the recent case of *In re Joddrell* (4), which is a case of the highest authority. In that case it was held that the Court was entitled to look to the other parts of the will to see what sense the testator had put on particular words, and that when it was found that he had employed the word "cousins" to mean both legitimate and illegitimate cousins, it was permissible to say that in using the word "relatives" he included relatives who were illegitimate. Following that, it appears to me clear that the testator here has given us his own interpretation of the language which he has used. He has shewn that when he used the word "nephew" he meant illegitimate as well as legitimate nephews, and when he used the word "niece" he meant it to refer to his illegitimate niece. Therefore, when he speaks of his nephew George Ashton—he may have meant either one or other—there is a latent ambiguity, and parol evidence may be let in to explain it. But, as it is admitted that if parol evidence is let in, it is shewn that George Ashton, the illegitimate nephew, is the person whom the testator intended, I grant probate of the will to the applicants.

Solicitors for the applicants: *Brownlow & Howe.*
Solicitors for the opponents: *Pritchard, Englefield & Co.*

(1) Law Rep. 18 Eq. 504.
(2) 3 K. & J. 252.
(3) 17 Ch. D. 382.
(4) 44 Ch. D. 590; [1891] A. C. 304.

W. L.

IN THE GOODS OF LEMME. 1892

Probate—Will proved Abroad—French Law—Probate of Copy. *Feb.* 2.

The will of a British subject domiciled abroad at the time of his death had been proved in the French Courts and deposited with a notary, who by the law of France was forbidden to allow it to be removed from his custody :—

Held, that probate might be granted of a copy of the original will properly proved, limited to such time as might elapse before the original itself should be brought in.

APPLICATION for probate.

Louis Christian Lemme died in Paris on December 21, 1891, leaving his wife and one sister as his next of kin and the only persons entitled in distribution, having duly executed a holograph will at Antwerp in the English form and in the English language on September 19, 1867, by which he appointed his wife his sole executrix and universal legatee.

The deceased was a British subject with an English domicil of origin, but domiciled at Antwerp at the time of his death. He left considerable property, the bulk of which was situate abroad, and there was personal estate in this country.

After his death a translation of his will was registered at the Civil Tribunal of the Seine in accordance with the law of France, and the original will was returned to the notary with instructions to him not to part with it, but to furnish copies of it or extracts from it to all persons whom it might concern. The notary, on an application from the solicitors of the executrix, at first was willing to lend the will to be brought to this country in order that it might be proved here; but on understanding that this Court would retain possession of it, he withdrew his consent, but allowed a copy of the will to be taken, which was duly verified by affidavit. An affidavit was also made by a French advocate to the effect that the registration of the will at the French Tribunal and its deposit with the notary was in accordance with the law of France, and that the notary was bound to retain custody of it, but that he might allow official copies of it to be taken which would be of the same authority as the original will itself.

1892

IN THE GOODS OF LEMME.

R. H. Pritchard, on behalf of the executrix, moved for a grant of probate of a copy taken by her solicitors of the original will deposited with the notary in Paris.

JEUNE, J. I think that the proper way to get over the difficulty created by the impossibility of obtaining the original will is to grant probate, not of the document recognised in France, as that would be a translation, but of a copy of the will properly proved to be such. Probate will be granted of such copy until such time as the original will is brought in.

Solicitors: *Nicol, Son, & Jones.*

W. L.

Feb. 2.

IN THE GOODS OF WILLIAM TAYLOR.

Probate—Will—Executors resident out of the United Kingdom—Person nominated to act for one of them—Grant of Administration with the Will annexed under s. 73 *of* 20 & 21 *Vict. c.* 77.

A testator by his will nominated two executors, both of whom at the time of his death were resident out of the United Kingdom. The will contained a paragraph requesting H. B. R., the partner of one of the executors, to act for him in the event of his absence. It appeared that there was urgent necessity for the appointment of an administrator of the estate of the deceased:—

Held, that administration with the will annexed might be granted to H. B. R. under s. 73 of 20 & 21 Vict. c. 77, until such time as one or other of the executors should come and prove the will.

APPLICATION for administration with the will annexed.

William Taylor, late of Madras, died on January 10, 1892, domiciled in this country, leaving a holograph will, of which he appointed William Hoyland Oakes and William Wheeler Wilkins the executors. The will contained this paragraph: "In the event of William Hoyland Oakes, of the firm of Messrs. Oakes & Co., of Madras and New Broad Street, London, not being in London at the time of my death, I will that Henry Benjamin Rust, of the said firm, act in the meantime as the representative of William Hoyland Oakes, and I trust he will not object to accede to this my request."

At the time of the testator's death both the executors were

1892

IN THE GOODS OF TAYLOR.

resident abroad, without any intention of returning to this country—Mr. Oakes being in Madras, and Mr. Wilkins in New South Wales. Mr. Rust made an affidavit that he had been well acquainted with the deceased for ten years and had represented him in many business transactions, and that he held a power of attorney from his partner, Mr. Oakes, in relation to his private and financial affairs. There was also an affidavit that sundry claims were being made against the testator's estate; that there were debts to be collected, leasehold houses to be looked after, and that furniture, jewellery, and other effects belonging to him were at present left in a house in the custody of servants.

B. Deane, moved that administration with the will annexed be granted to Mr. Rust. It is clear that he cannot take probate, and, as there is a necessity for immediate representation of the estate of the deceased, this is the only method in which it can be obtained.

JEUNE, J. Under the circumstances, I will make a grant of administration with the will annexed to Mr. Rust under the 73rd section of 20 & 21 Vict. c. 77, until one or other of the executors come in and take a grant of probate.

Solicitor: *Arthur A. Tilleard.*

W. L.

1892
Jan. 13.

YARROW *v.* YARROW.

Divorce—Husband's Petition—Insanity of Wife.

In a petition by the husband for a dissolution of the marriage on the ground of the wife's adultery, the guardian ad litem of the wife, who was insane at the time of the presentation of the petition, pleaded that if she had committed adultery she was not of sound mind or responsible for her actions at the time, and that she was incapable of understanding the guilty nature of her acts, and legally incompetent to consent to them:—

Held, that though the wife might have been subject to insane delusions on some points, if at the time she committed adultery she was capable of appreciating the nature of the act and its probable consequences, her insanity was not a defence to the petition.

Quære, whether such insanity as would entitle the defendant in an indictment for a criminal offence to an acquittal would constitute a valid answer to a suit for divorce on the ground of adultery.

THIS was a petition by the husband for a dissolution of the marriage on the ground of his wife's adultery. The wife at the time of the filing of the petition was insane, and confined in a lunatic asylum, and her brother had been appointed her guardian ad litem. In his answer he denied the adultery, and in the second paragraph pleaded that the respondent was of unsound mind at the date on which she was alleged to have committed adultery, and "that if she did commit adultery, she was not in any way responsible for her actions or capable of understanding the guilty nature of the acts which she committed, or competent legally to consent to the commission of such acts."

The case was tried before the President without a jury.

Sir *E. Clarke, S.G.* (*B. Deane*, with him), for the petitioner.

Inderwick, Q.C. (*Marshall Hall*, with him), for the respondent.

From the evidence of the petitioner and the other witnesses examined, it appeared that the parties were married at St. Giles's Church, Camberwell, in 1874, the petitioner being then twenty-eight years of age and the respondent twenty; that they went shortly afterwards to Monte Video, where the petitioner was engaged in business as a corn merchant, and remained there until 1886, when they returned to England, and ultimately settled in Herefordshire. There was no issue of the marriage. On the voyage

1892

YARROW v. YARROW.

out to South America the respondent confessed to her husband that before her marriage she had lived an immoral life for two years, and had contracted a disease. Up to the year 1890 they lived happily together; but in that year the respondent's feelings towards her husband seemed to undergo a sudden revulsion, and she became dissatisfied with him. In 1890 she expressed a wish to come to London to consult a doctor, and when her husband offered to accompany her to London, or to send a servant with her, she insisted on going alone. She accordingly came to London in the month of July, and consulted the doctor who had attended her in her previous illness, and who, having examined her, assured her that she was in good health and had no ailment. She took lodgings in Bernard Street, Brunswick Square; and it was proved by the landlady that she committed adultery there on several occasions with men whom she brought in from the street. She wrote a letter to her husband, telling him that she had committed adultery, and that she intended to do so again, and suggested that he should get a divorce, adding, "If you do not care to get a divorce, you will have to maintain me." She also made a similar statement to the petitioner's solicitor in an interview which she had with him.

The petitioner was at first unwilling to commence a suit for divorce, and negotiations were carried on for some time for a deed of separation, which, however, were broken off on account of the dum casta clause. On August 18, in an interview with the petitioner's solicitor, she stated to him that she knew perfectly well she was committing adultery, and intended so to continue. On September 23 she presented herself at the police-station in her night-dress, claiming the protection of the police against some imagined danger, and talking incoherently of "knives and poison." At that date she was undoubtedly insane; and she was subsequently confined in an asylum, where she still remained. Before leaving her husband in July, she had talked at times of poison, and once had accused him of administering poison to her to weaken her sexual desires and to reduce her to the same state as that in which he himself was.

Inderwick, Q.C., submitted that the respondent, at the time of the commission of the adultery, was labouring under the insane

1892

YARROW v. YARROW.

delusion that her husband was attempting to poison her, and that she had gone to London with the deliberate intention of bringing about a divorce and getting rid of him by committing adultery.

THE PRESIDENT. Even assuming this lady to have been of unsound mind and subject to insane delusions on some points, I am prepared to hold, that if at the time she committed adultery she was capable of appreciating the nature of the act and its probable consequences, her insanity would be no defence to her husband's petition. The case is a painful one; but it is not one which presents any great difficulty. There is no doubt that the acts of adultery charged against the respondent are established by the evidence. She has herself written letters stating that she committed adultery. This, coupled with the evidence of the landlady, can leave no reasonable doubt that adultery was committed. Then it is said that, at the time of the commission of these acts of adultery, the respondent was of unsound mind—not in any way responsible for her actions, or capable of understanding the guilty nature of the acts, or of legally consenting to the commission of them. The allegation that she was incapable of understanding the nature and consequences of the acts of adultery is not sustained by the evidence—indeed, it is absolutely negatived. Still, I have to decide the question whether she was so insane as to make her insanity a defence to this suit. The evidence clearly establishes that at the time the improper intercourse with men occurred the respondent, though not absolutely of sane mind and not free from delusions, was quite capable of appreciating the character of the acts charged against her and the consequences which those acts might entail. Such being the state of the case, if those acts had been not only criminal but punishable by the criminal law, the defence of insanity could not be sustained. That is a view which possibly carries us beyond anything which is necessary for this case, because I am by no means sure—though I express no opinion upon it now—that insanity which would entitle an accused to an acquittal on an indictment for a crime would constitute a valid defence to a suit for divorce on the ground of adultery. In order that the respondent may be under no difficulty in

1892

YARROW v. YARROW.

The President.

carrying the case to a higher tribunal, if so advised, I may state that my judgment proceeds on the assumption that she left her home under the delusion that her husband was administering, or attempting to administer, poison to her, and that she believed that at the time she committed the adultery charged against her it might probably be the means of bringing about a divorce. That being my view of the case, I hold that the defence of insanity set up fails, and that the husband is entitled to the relief which he asks. I, therefore, pronounce a decree nisi.

Solicitors for the petitioner: *Stoneham & Sons.*

Solicitor for the respondent: *Robinson.*

W. L.

THE ROBIN.

1892

Feb. 12, 13, 15, 17.

Admiralty—Practice—Costs—Higher Scale—Rules of the Supreme Court, Order LXV., *r.* 9—*Scientific Evidence—Plans.*

By Order LXV., r. 9, of the Rules of the Supreme Court, 1883, "The fees set forth in the column headed 'higher scale' in Appendix N may be allowed . . . in any cause or matter . . . if, on special grounds arising out of the nature and importance or the difficulty . . . of the case, the Court . . . shall at the trial or hearing . . . so order. . . ."

The plaintiffs, owners of a steamship, brought an action in the Admiralty Division of the High Court, claiming damages against the defendants, a port and harbour authority, for injuries sustained by the vessel owing to the alleged negligence of the servants of the defendants in not keeping the bed of the harbour in a proper and fit state for the vessel to ground upon at low water.

The defendants by their defence alleged (inter alia) that the damage was occasioned by the inherent weakness and unfitness of the vessel to take the ground with the cargo she had on board.

The trial of the action lasted the greater part of four days, and, owing to the nature of the defence set up, several engineers and surveyors were called on both sides, who produced plans in support of their respective views as to the strength and construction of the vessel.

Judgment was given for the plaintiffs on the ground that the damage sustained by the vessel was due to a ridge of gravel left in the bed of the harbour by the negligence of the servants of the defendants.

On the question of costs:—

Held, that the plaintiffs were entitled to an order for costs on the higher scale inasmuch as the case was special in its nature, involving the calling of a number of scientific witnesses, the preparation of plans, and had been so presented as greatly to facilitate its trial.

THE plaintiffs were the owners of the steamship *Robin*; the defendants were the mayor, aldermen, and burgesses of Preston.

1892

THE ROBIN.

The action was for damages for injuries sustained by the plaintiffs' vessel through the alleged negligence of the defendants in their capacity of the port and harbour authority of Preston.

The case is reported only on the question of costs.

The plaintiffs by their statement of claim in substance alleged that on February 24, 1891, the *Robin* entered this tidal "harbour for the purpose of discharging her cargo at the defendants' quays or landing stages, and the master berthed the said vessel alongside one of the said quays in the position pointed out and directed by the defendants' harbour master," but that "the ground and bottom of the harbour and the place aforesaid was not level or in a fit or proper or safe state and condition for the said vessel to ground upon, and by reason thereof the said vessel was broken, damaged, and injured."

The defendants pleaded (inter alia) that the plaintiffs' "vessel was not strongly enough built, or was too weak to take the ground with safety and with the cargo she had on board, and the damage to the said vessel, if any . . . was occasioned by the inherent weakness and unfitness of the said vessel to take the ground with the said cargo on board, and not from any defect in the said berth."

The trial of the action lasted the greater part of four days, and, owing to the nature of the defence set up, several engineers and surveyors were called on both sides, who produced plans in support of their respective views as to the strength and construction of the vessel.

In the result, the learned judge, after consultation with the Trinity Masters, gave judgment for the plaintiffs, on the ground that the injuries sustained by the *Robin* were due to the vessel settling on a ridge of gravel left by the negligence of the servants of the defendants in the berth allotted to the vessel under the superintendence of the harbour-master. The amount of damages was referred to the registrar and merchants.

On the question of costs,

Barnes, Q.C., and *Joseph Walton*, for the plaintiffs. Order LXV., r. 9, of the Rules of the Supreme Court (1), as to costs on the

(1) Rules of the Supreme Court, 1883, Order LXV., r. 9: "The fees set forth in the column headed 'higher scale' in Appendix N may be allowed

1892

THE ROBIN.

higher scale applies; for, in considering whether the costs of a cause shall be awarded upon the higher scale, the Court will have regard to the manner in which the case has been prepared and conducted at the trial: see per Kekewich, J., in *Davies* v. *Davies*. (1) Here the trial has occupied a considerable time, and the nature of the defence has not only involved the plaintiffs in much labour in preparing for trial, but has necessitated calling several scientific witnesses and the preparation of a number of plans.

Finlay, Q.C., Sir Walter Phillimore, and *F. W. Raikes,* for the defendants.

JEUNE, J. There will be an order for costs on the higher scale. The case is special in its nature. It has involved the calling of a number of scientific witnesses, the preparation of plans, and the case has been so presented as greatly to facilitate its trial.

Judgment for plaintiffs, with costs on the higher scale.

Solicitors for plaintiffs: *Thomas Cooper & Co.*

Solicitor for defendants: *C. E. Bird, for Henry Hamer, Preston.*

. . . in any cause or matter . . . if, on special grounds arising out of the nature and importance or the difficulty . . . of the case, the Court . . . shall at the trial or hearing . . . so order . . ."

(1) 36 Ch. D. 359, at p. 374.

T. L. M.

1892
Feb. 16.

ARMSTRONG *v.* ARMSTRONG AND THE DUKE OF ORLEANS.

Divorce—Jurisdiction—Act on Petition—Commission to examine Witnesses—Witnesses examined by Foreign Tribunal—Injunction.

In a petition by the husband for a dissolution of marriage on the ground of the wife's adultery, the co-respondent filed an act on petition denying the jurisdiction of the Court. The petitioner had obtained an order for a commission to examine witnesses in Vienna, which was suspended pending the hearing of the act on petition; but in the meantime he applied to the Court at Vienna, acting, as was alleged, under the provisions of the Austrian Code for the perpetuation of evidence, to summon witnesses before it, and examine them on oath.

The Court, on the application of the respondent, made an order restraining the petitioner from further prosecuting the proceedings before the Court at Vienna.

MOTION for injunction to restrain a petitioner from proceeding with the examination of witnesses in a foreign Court.

This was a petition by the husband praying for a dissolution of the marriage on the ground of his wife's adultery with the co-respondent. The respondent denied the adultery, and made counter-charges; and the co-respondent had appeared under protest and filed an act on petition disputing the jurisdiction of the Court. The petitioner had obtained an order for a commission to examine witnesses in Vienna, at which place, among others, it was alleged adultery had been committed; but this had been suspended until the act on petition had been argued. In the meantime the agents of the petitioner in Vienna had summoned certain witnesses before a Court in Vienna to take evidence for the perpetuation of testimony; and it was stated in an affidavit by an Austrian advocate that the Viennese Courts claimed the power under Article 179 of the Austrian Code to take the examination on oath of witnesses whose testimony was required under such circumstances.

Sir W. Phillimore, (*Mansfield*, with him), for the respondent, moved the Court for an injunction to restrain the petitioner from further proceeding in the matter of a certain order and appointment of the tribunal of Vienna for the examination of persons employed in the Hotel Sacher, and from further

prosecuting, before or under the authority of the said tribunal, any proceeding in relation to the matters in question in this cause; or in the alternative, that the petitioner be ordered to elect whether he will proceed with this suit or with the proceedings which he has commenced in Vienna. The proceeding which the petitioner has commenced in Vienna is something more than the mere taking of proofs, because the witnesses are examined on oath, and subject to the pressure of foreign procedure. It is unjust to the respondent, as she is not represented; it may put her to additional expense, and the course of justice may be prejudiced by the premature publication of the one-sided evidence taken at Vienna. It is rather in the nature of double or concurrent proceedings, which the Court will stop unless they confer some advantage on the suitor which he could not obtain in his suit in this country.

[He cited *Fischer* v. *Sztaray* (1); *McHenry* v. *Lewis* (2); *Peruvian Guano Co.* v. *Bockwoldt* (3); *Carron Iron Co.* v. *McLaren* (4); *Wedderburn* v. *Wedderburn* (5); 20 & 21 Vict. c. 85, s. 46.]

It is no answer to say that these proceedings are auxiliary to the progress of the cause, for this evidence, when it has been taken, will be of no use in the trial in this Court. The proceeding, therefore, must be considered as a separate and independent action on the part of the petitioner, and as useless and vexatious.

Ram, for the petitioner. The difficulty in this case arises from the action of the co-respondent in disputing the jurisdiction of the Court. The petitioner is, in consequence of this objection, unable to proceed with the commission which he had obtained for the examination of witnesses. They are a class of witnesses, waiters, chambermaids, and the like, who are more or less migratory, and the interests of the petitioner require that their evidence should be taken without delay. It is true that the evidence cannot be used in this Court; but it will not be lost, as it might be if these proceedings were not taken; and without some such proceedings the witnesses would not give their proofs.

(1) 27 L. J. (Q.B.) 239.
(2) 22 Ch. D. 397.
(3) 23 Ch. D. 225.
(4) 5 H. L. C. 416.
(5) 2 Beav. 208.

1892

ARMSTRONG v. ARMSTRONG.

The respondent would be benefited by the proceedings, seeing that she would know beforehand what the case was against her; and it was open to her to be represented by counsel.

[JEUNE, J. But you will not be compelled to produce the evidence at the trial, as you would be if it were taken on commission.]

As to the alternative motion, that is wholly unnecessary, as the petitioner has no intention of bringing any suit in the Court at Vienna. These proceedings were originally instituted simply for the purpose of obtaining the proofs of the evidence which those witnesses would give; and it is the Vienna tribunal which has given them the semblance of a legal proceeding by taking the matter to a certain extent into its own hands.

JEUNE, J. In this case the petitioner, having commenced a suit for divorce in this Court, and having applied for a commission to examine witnesses in Vienna, has been met with the objection that this Court has no jurisdiction. In consequence of that objection the proceedings in the petition and in regard to the commission have been stayed. That being the position in which the case stands at present, the petitioner goes to the Court at Vienna, and avails himself of the power of the Court there for the perpetuation of testimony to call before it, according to its procedure, certain witnesses whose testimony his legal advisers think may bear on the issues which are raised in the suit. Is that a proceeding which this tribunal ought to permit the petitioner to take? I think it is not, and on two main grounds. First, I think it is useless, in the sense that the petitioner can obtain no legitimate advantage from it; secondly, I think it is or may be injurious to the proper course of proceeding in this Court. It is admitted that the evidence thus taken could not be used before this tribunal. Apart from other considerations, the Act of 1857 expressly and exhaustively provides how evidence may be taken, and by s. 47 it provides that in certain cases a commission may be issued for the examination of witnesses abroad in the manner therein specified. But the Court has held that it is not entitled to order the issue of such a commission in this case in the position in which it stands at

the present moment. What has been done at Vienna has been represented as auxiliary to this suit; but it clearly is not auxiliary in the sense that the evidence taken before the Court in Vienna can in any way be made available before the Court here. The case of the *Peruvian Guano Co.* v. *Bockwoldt* (1) appears to me to shew that, whether the second proceeding be before a foreign tribunal or a tribunal in this country, in either case the rule is this: that such a proceeding ought not to be allowed if a person can only obtain an illusory advantage from it. In this case I think that no legitimate advantage of any kind can be obtained. This brings me to the second ground to which I have referred. The only advantage suggested here is that the petitioner may be able to bring before the Vienna tribunal witnesses whose evidence he does not know, and to take their proofs under the pressure of an oath. He thus will get to know all that the witnesses may prove, and he will be under no obligation to produce that evidence before this Court, as he would be if the evidence were taken on commission. That appears to me to be an interference with the proper course of the administration of justice in this Court. Moreover, we do not know under what rule of law these witnesses may be examined. They may, and from what was said by Mr. Ram I gather will, be unwilling witnesses; and they may be subjected to questions in the nature of cross-examination by the petitioner's counsel, and, it appears also, by the Court, and, further, information beyond their proper evidence may be extracted from them. This appears to be a mode of dealing with testimony which we should not allow, and to go far beyond any process of discovery recognised in the procedure of this country. It amounts to interrogating your opponent's witnesses before trial. The matter is not made any better by the argument that the respondent may have the right of appearing before this tribunal; for though she may have a right to go, she has also a right to say that she will not go. It is clear to me, therefore, that the petitioner is not entitled to do what he has done. He can gain no legitimate advantage from it; on the contrary, a serious disadvantage may accrue to the administration of justice. I think he ought to be restrained

(1) 23 Ch. D. 225.

1892

ARMSTRONG v. ARMSTRONG.

from further action of this kind, and there will be a personal injunction on him restraining him from prosecuting the proceedings which he has begun before the Vienna tribunal.

Solicitors for the petitioner: *Gedge, Kirby, & Millett.*
Solicitors for the respondent: *Wadeson & Malleson.*

W. L.

1892
Feb. 19.

CONNEMARA *v.* CONNEMARA.

Divorce—Intervener—Decree Absolute—Variation of Settlements—Title of Suit.

In a petition by the wife for dissolution of the marriage on the ground of adultery and cruelty, one of the persons with whom the husband was alleged to have committed adultery obtained leave to intervene, and her name was added to the title of the suit. Subsequently she obtained an order for a commission to examine witnesses abroad, and for the postponement of the trial of the issues affecting her until the return of the commission.

The petitioner obtained a decree absolute, on evidence which satisfied the Court that the respondent had committed adultery with women other than the intervener; and the issue affecting her was never tried:—

Held, on a subsequent petition for variation of settlements, that the name of the intervener must be struck out of all pending and future proceedings.

MOTION to discharge an order, made by the President in chambers, striking out the name of an intervener from all pending and future proceedings in the cause.

The petition was presented by Lady Connemara against her husband, Lord Connemara, praying for a dissolution of the marriage on the ground of adultery coupled with cruelty. One of the persons with whom the respondent was alleged to have committed adultery obtained leave to intervene, and the original title of the cause was amended by the insertion of her name as intervener. On November 12, 1890, an order was made on the application of the party intervening for a commission to India to examine the respondent, and for the postponement of the trial of the issues affecting the party intervening until after the trial of the other issues.

The issues were tried before the President (Sir J. Hannen) on November 27, 1890, and a decree nisi was pronounced, which was made absolute on June 9, 1891. The issue affecting the party intervening was never tried.

1892

CONNEMARA v. CONNEMARA.

On July 9, 1891, a petition was presented for variation of settlements, the name of the intervener being on the title filed; and on November 30, 1891, the intervener took out a summons to have her name struck out of all pending and future proceedings. The registrar held that he had no jurisdiction to make such an order; but the President (Sir C. P. Butt), on appeal in chambers, made the order as prayed.

Graham Tahourdin, for the petitioner, moved to discharge the order. The Court has no jurisdiction to make such an order under the circumstances of this case. It can only dismiss an intervener or a co-respondent from a suit on two grounds—first, where the judge at the trial is satisfied that the evidence is insufficient to support the charge; and secondly, where the suit is not prosecuted with due diligence. Neither of these grounds exists here; for the case against the intervener has not been heard, and if there has been any delay it has been due to the intervener's application for a commission and for postponement of the trial. The name of the intervener is on the original suit, and, this being a petition supplemental to the original cause, the petitioner is entitled to have the name of the intervener on the proceedings in the same manner as a petitioner should be entitled to have the name of a co-respondent retained upon the record. The intervener is not entitled to be dismissed, for the petitioner has evidence against her, though she was precluded by order of the Court from going into it at the trial.

B. Deane, for the intervener. This is a petition for variation of settlements, and the intervener is not in any way concerned in the matter before the Court. It can be no benefit to the petitioner to keep the intervener's name on the file.

THE PRESIDENT. In this case the main question in the cause has been disposed of, and the petitioner has obtained a decree absolute dissolving her marriage. It is now sought to bring in the name of the intervener on proceedings for the variation of settlements, which, I think, would be a gross abuse of the process of the Court, seeing that the whole matter has been disposed of without any evidence being offered against her. I cannot

1892

CONNEMARA v. CONNEMARA

conceive any proper motive for joining the intervener's name in proceedings which are exclusively between husband and wife. I dismiss the motion with costs.

Solicitors for petitioner: *Gedge, Kirby, & Millet.*
Solicitors for intervener: *Lawrence, Graham & Co.*

W. L.

1892
Feb. 16.

IN THE GOODS OF ATHERTON.

Probate—Will—Sole Executrix a Lunatic—Personal Service of Citation dispensed with—Grant to Creditor under s. 73 *of* 20 & 21 *Vict. c.* 77.

The sole executrix and universal legatee of a deceased testator was his widow. She was a lunatic, and a guardian had been appointed in the Chancery Division to receive certain rents, &c., to which she was entitled. A creditor of the deceased testator applied for a grant of administration with the will annexed, and served a citation on the guardian, who refused to allow personal service on the lunatic:—

Held, that a grant might be made to the creditor under the 73rd section of 20 & 21 Vict. c. 77, without requiring the lunatic to be personally served.

APPLICATION for administration with the will annexed.

The testator, the Rev. Robert Heys Atherton, died on November 3, 1887, leaving a will duly executed, bearing date February 27, 1883, by which he appointed his wife his universal legatee and sole executrix.

By an order of the Lords Justices under the Lunacy Regulation Act, 1862, Sarah Amelia Gribble, the niece of the widow, was appointed to receive and give discharges for certain income payable to the widow, she being a person of unsound mind not so found by injunction, and to apply the said income for her benefit.

William Dowding, the applicant, was a creditor of testator's estate, and held security for a part of his debt, but was unable to realize the security until a representative to the estate was appointed. He therefore extracted a citation calling on the widow to accept or refuse probate, or to shew cause why administration with the will annexed should not be granted to him. The citation was duly served on Miss Gribble; but she refused to allow the citation to be served personally on the lunatic.

1892

IN THE GOODS OF ATHERTON.

Searle, on behalf of the applicant, moved that a grant of administration with the will annexed be granted to him without the necessity of citing the lunatic.

JEUNE, J., made the grant as prayed, under the 73rd section of the Probate Act of 1857.

Solicitors: *Steavenson & Couldwell.*

W. L.

THE N. STRONG.

1892

Feb. 25, 26.

Admiralty—Collision—Duty of Steamer before entering Fog—Speed of Sailing Vessel in Fog—Sea Collision Rules, art. 12 (*a*), *art.* 13.

By art. 12 (*a*) of the Regulations for Preventing Collisions at Sea, a steamship is required to whistle "in fog." By art. 13, "A sailing ship or steamship shall in a fog . . . go at a moderate speed."

A collision occurred between a steamer and a sailing vessel, about five to six miles S.W. of the Longships in the English Channel. Immediately before the collision the steamer was proceeding S.W. b. S. at the rate of eight or nine knots, and approaching a bank of fog, in which the sailing ship was, but did not sound her whistle, or reduce her speed. The sailing vessel (a barque) was heading N.N.W. with a moderate south-easterly breeze of force between three and four, and, under all plain sail, except her mainsail, spanker, and light sails, was making about four knots an hour.

In an action of damage by collision:—

Held, that the steamer was to blame for excessive speed, and that, though it was not an infraction of the terms of arts. 12 (*a*), 13, she ought as a matter of precaution to have whistled on approaching the fog, and also to have reduced her speed:

Held, also, that the sailing vessel had not infringed art. 13, as, considering the locality, she was not proceeding at a rate of speed beyond what was necessary to keep her well under command.

ACTION of damage by collision. The plaintiffs were the owners of the barque *Eulie.* The defendants were the owners of the steamer *N. Strong.*

The facts—so far as material on the question of the speed of the barque in a fog, and of the sounding of the whistle, and reduction of the speed, of the steamer before entering a fog—were shortly as follows:—

On May 12, 1891, the barque *Eulie,* of 335 tons register, with a crew of ten hands, was in the English Channel, proceeding in

1892

THE N. STRONG.

ballast from London to Appledore in the county of Devon. The weather was foggy, and there was a south-easterly breeze of force between 3 and 4. (1) She was on a N.N.W. course, making about four knots, under foresail, fore and main upper and lower topsails, topgallantsails, and foretopmaststaysail. About 3.40 A.M., when about five to six miles S.W. of the Longships, those on board the *Eulie* heard the sound of a propeller, and, shortly afterwards, observed, about three points on the starboard bow, and about two ships' lengths off, the red, and then the masthead, light of a steamship crossing the bows of the *Eulie* at considerable speed. The helms of both vessels were put hard-a-port; but the jibboom of the *Eulie* fouled the funnel of the steamer, and then the stem of the *Eulie* struck the port quarter of the steamer, causing considerable damage to the barque.

The steamer proved to be the *N. Strong*, a steamtug belonging to Cardiff, of seventy-five horse-power nominal, with a crew of eight hands. She had been looking out for a vessel to tow up to Cardiff; but, at the material time, though the weather was slightly hazy, with a bank of fog ahead, she was proceeding at a speed (according to the finding of the learned judge) of some eight or nine knots, and steering about S.W. by S. for the fishing ground off the coast of Cornwall. She did not whistle or reduce her speed on approaching the bank of fog, and, immediately after entering it, those on board the *N. Strong* saw, through the fog, at a distance of 100 yards, and about two and a-half to three points on the port bow, the barque with which she came into collision, and in respect of the damage caused thereby the defendants counter-claimed.

The material charges for the purposes of this report were :—

On the part of the *Eulie*: that the *N. Strong* failed to observe art. 12 (*a*) of the Regulations for Preventing Collisions at Sea (2),

(1) Figures to denote the force of the wind :—

3 = gentle breeze.

4 = moderate breeze.

(2) Regulations for Preventing Collisions at Sea :—

Art. 12: "In fog, mist, or falling snow, whether by day or night, the signals described in this article shall be used as follows—that is to say,

(*a.*) "A steamship under way shall make with her steam whistle, or other steam sound signal, at intervals of not more than two minutes, a prolonged blast."

1892

THE N. STRONG.

by not duly sounding her steam whistle, and failed to comply with art. 13 of the same regulations (1) as to speed in a fog.

On the part of the *N. Strong*: that the *Eulie* failed to comply with art. 13 of the same regulations (1) by proceeding at too great a rate of speed, having regard to the fog.

Barnes, Q.C., and *J. P. Aspinall*, for the plaintiffs.

Pyke, Q.C., and *H. G. Farrant*, for the defendants.

The arguments of counsel sufficiently appear from the judgment. For the plaintiffs, on the question of the speed of the barque, the case of *The Elysia* (2) was cited. For the defendants, the cases of *The Beta* (3); *The Dordogne* (4); and on the question of the duty of the steamer to whistle, *The Milanese*. (5)

JEUNE, J. Mr. Pyke has made the very most of the materials which he had at his disposal; but the best possible use of the materials at his disposal does not appear to the Trinity Masters and myself to entitle him to succeed on what is really the main point in this case. The main point in the case, as he justly said, is the speed of the sailing vessel, and that is the matter upon which I specially desired to consult the Trinity Masters. It is a matter of inference, from several facts, what was the speed of the sailing vessel. We know, according to her own account, what sails she had; and I quite agree that Mr. Pyke made what I thought, and the Trinity Masters thought, was a good point, in saying that one at least of her sails (the topgallant sail) might have been lowered, which would, according to the mate, have had the effect of reducing her speed as much as three-quarters of a knot. Then what was her speed without that sail being lowered? That I am asked to infer from a certain distance traversed by her in a certain time. So the force of the wind and the operation of the tide come into calculation. Considerable discussion arose as to the force of the wind; and we have to gather it from the statements of the witnesses, who have described it in varying language,

(1) Regulations for Preventing Collisions at Sea:—

Art. 13: "Every ship, whether a sailing ship or steamship, shall, in a fog, mist, or falling snow, go at a moderate speed."

(2) 4 Asp. Mar. L. C. 540.

(3) 9 P. D. 134.

(4) 10 P. D. 6.

(5) 4 Asp. Mar. L. C. 318.

1892

THE N. STRONG.

Jeune, J.

but language not unnaturally varying, because the terms of description of wind are not terms which are used with the strictest accuracy. We have further the statements, to which I attach more importance—although even this one cannot consider as matter of great accuracy—the statements from the two lighthouses from which we have the reports. Putting these things together, one would suppose that before the time of the collision the wind was something that will be represented by the figure 3 or the figure 4, or something between them. There is also to be considered the question of the tide, and that has given rise to an interesting discussion and to interesting calculations. It appears to me that the net result of those calculations is practically to leave the tide almost out of account, because its effect with and against the barque work out nearly equal. But so far as it affects the matter, the opinion of the Trinity Masters is that on the whole the tide would be rather with than against the barque. Putting all these things together, and taking the distance which the vessel traversed from a point nine miles off the Lizard, where she puts herself, to the place of collision, and calculating the place of collision as well as one can from the statement given by the sailing vessel herself, and with due allowance for the calculations made on behalf of the tug—putting all these things together, it seems to me on the whole that the rate of speed which is to be attributed to the sailing vessel is something about four knots. Now, if that is so, was that too much? The law on the subject is quite clear. A sailing ship is entitled to move at such a rate of speed as will enable her to keep properly under command; and I agree with, and accept, the decisions which go to the effect that what is properly under command varies, and that, under some circumstances, a vessel may be entitled to go at a higher rate of speed than in others. I agree that whether the position of the vessel is in the open sea, or in a river like the Thames, or off a difficult coast, is a matter which has to be taken into consideration. Now, it appears to me that that is a matter on which the advice of the Trinity Masters is of great importance. I do not profess myself to be able to say what rate of speed a sailing vessel should have in order to keep well under command; but the Trinity Masters have considered the matter, and they tell me that if the speed of

1892

THE N. STRONG.

Jeune, J.

the vessel was about four knots, as I have found it to be, they do not think any blame attaches to the vessel for that rate of speed. It will be observed that in dealing with the matter I am not taking into consideration the question of the state of the vessel's bottom. No doubt some of the copper was off; but I am not satisfied that that made any material difference. The mere fact of a certain number of plates being off, unless they stuck out and impeded her course, would not substantially alter her speed, and I am not satisfied that the state of her bottom was more than this—that some of her copper plates were gone. It is quite true that by the evidence on the part of the tug the speed of the sailing vessel is put at something like seven or eight knots; but that appears to me to be quite out of the question. So far as the indications of the blow are concerned, they seem to me to point rather to a less than to a higher speed on the part of the barque. The only other point to be dealt with with regard to her is as to the use of the fog-horn. Putting the facts together as well as I can, I cannot help thinking on the whole that the fog-horn was blown several times—it may be three, or it may be four or five. Now, if the tug had only heard one blast so late as to be useless to her, that would be a very important fact in her favour; but the tug never heard any fog-horn at all, and therefore she appears to me to be hardly in a position to say that the absence of the fog-horn being blown contributed, so far as she was concerned, to the collision. But what I strongly suspect is, that the fog-horn was blown, perhaps, not so soon as it should have been, but within something like four or five minutes before the collision, which would have been in ample time to avert the collision if the tug had heard it at all. Assuming that the fog-horn was blown at some such period, I think that that would have been time enough to give indications to the tug that the vessel was there if the tug had heard her. The result is that I do not think the sailing vessel can be held to blame. Now, as regards the steamer, there is one matter which is very clear. I have no doubt at all, and the Trinity Masters agree with me, that the speed of the tug was excessive. Several indications appear to point conclusively to that. At the time she had stopped seeking, and had set her course for the fishing ground,

1892

THE N. STRONG.

Jeune, J.

to which she tells us she usually goes at the rate of eight or nine knots, and there seems no reason why she should not have followed her usual practice on this occasion. The facts also suggest that so severe a blow was dealt by one vessel to the other as to be inconsistent (the speed of the barque being what I have found) with moderate speed on the part of the tug. The tug admits that when she approached this bank of fog she never eased at all and never whistled at all—and that is an admission which is dangerous, indeed, to my mind fatal. I agree it is not an infraction of the rules, which refer, in terms, only to what is to be done in a fog; but the Trinity Masters are clear that, as a matter of precaution, the steamer approaching a thick bank of fog should have eased, and should also have whistled to give notice of her position to any vessel which the curtain of fog might be concealing. Under these circumstances the conclusion to which I am compelled to come is that the steamer *N. Strong* is alone to blame.

Solicitors for plaintiffs: *Stocken & Jupp.*

Solicitors for defendants: *Ingledew, Ince, & Colt, for Ingledew, Ince, & Vachell, Cardiff.*

T. L. M.

1892

Jan. 14.

[IN THE CHANCERY COURT OF YORK.]

THE OFFICE OF THE JUDGE PROMOTED BY HAKES *v.* COX.

Ecclesiastical Law—Church Discipline Act (3 & 4 *Vict. c.* 86)*—Criminal Suit—Dependence of Cause in deference to Proceedings in Temporal Courts—Lapse of Time—Disobedience to Monition—Discretion to refuse enforcement of Monitions by means of Proceedings in Original Suit.*

Monitions in a criminal suit under the Church Discipline Act against a clerk in orders, though general in terms and admonishing the defendant to abstain for the future from the like offences to those the Court at the hearing pronounced him to have committed, are not to be regarded as forbidding him under pain of being pronounced in contempt to resort at any time during his life to the practices from which he has been so admonished to abstain.

Upon an application against a clerk in orders to enforce monitions by which he had been admonished to abstain in future from certain illegal practices in the conduct of Divine service, it appeared that in July, 1885, the defendant, a clerk in orders, holding a benefice within the province of York, had been pronounced by the Court to have, in July, 1884, committed certain offences in matters of ritual when officiating in his church;

that two monitions to refrain from the like offences (dated December 31, 1885, and June 7, 1886), obedience to which it was sought to enforce, had been duly served on him on January 2, 1886, and June 13, 1886, respectively; that, founded upon disobedience to the former of these two monitions, a decree of suspension ab officio for six months had been pronounced against him in the same suit in April, 1886, and subsequently, the suspension having been disregarded, proceedings by way of significavit had been taken, under which he was imprisoned from May 4, 1887, to May 20 in that year; that during all the time between August 7, 1886, and April 28, 1887, and between May 20, 1887, and August 7, 1890, proceedings in the temporal Courts were pending relative to and in connection with the suit; and that in October, 1890, the defendant, when officiating in his church, repeated some of the offences he had been pronounced guilty of at the hearing. The application to enforce the monitions was made on April 9, 1891; and there was no evidence before the Court as to the conduct of the defendant between May 20, 1887, and October 19, 1890:—

Held, that having regard to the time which had elapsed since the expiration of the sentence of suspension, the application ought not to be granted.

ON July 30, 1885, at the hearing of this cause, which came before this Court by virtue of letters of request signed by the Bishop of Liverpool under the Church Discipline Act, and in which the party promoting the office of the judge was James Hakes, of the city and diocese of Liverpool, surgeon, and the defendant was the Rev. J. Bell Cox, the perpetual curate of St. Margaret, Toxteth Park, in the parish of Walton-on-the-Hill in the same diocese, and was charged with having, by certain illegal practices (1) in the conduct of Divine service when officiating in his church in July, 1884, offended against the laws ecclesiastical, the Official Principal of this Court (The Right Honourable Lord Penzance), sitting in the cathedral at York, pronounced "that the proctor for the promoter had sufficiently proved the articles given in and admitted in the suit, and that the said J. Bell Cox had offended against the statutes laws constitutions and canons of the Church of England in the particular manner set forth in the said articles pronounced to have been proved as aforesaid, and that he be admonished to abstain from the like offences in future."

In accordance with this decree, a monition to refrain in future from committing again the offences which were alleged in the

(1) The nature of those illegal practices are, so far as material to this report, sufficiently described in the monition of December 31, 1885, hereafter in part set out.

1892

HAKES v. COX.

said articles, and duly proved as aforesaid, or any or either of them, issued under the seal of the Court, bearing date August 19, 1885, and was duly served on the defendant on September 5, 1885. This monition was disobeyed by the defendant, and his disobedience having been proved to the Court, another monition, dated December 31, 1885, issued, and was served on the defendant on January 2, 1886. (1) The portions of this monition of December 31, 1885, material to this report were in substance as follows:—

James Plaisted Baron Penzance, M.A., Official Principal and Auditor of the Chancery Court of the . . . Archbishop of York . . . to all and singular clerks and literate persons whomsoever and wheresoever in and throughout the whole province of York, Greeting, Whereas we rightly and duly proceeding in a certain cause of our office which was lately depending before us in judgment between J. Hakes . . . surgeon, a member of the Church of England, the party promoting the said cause on the one part, and the Rev. James Bell Cox . . . the party accused and complained of on the other part, and duly cited to answer certain articles . . . and more especially for having within the said diocese of Liverpool and within two years last past offended . . . in the said particulars hereinafter set forth, that is to say [the monition then recited the articles in the suit at length, and proceeded] did by our final interlocutory decree . . . pronounce, decree, and declare . . . that the said J. Bell Cox be admonished to refrain from the like offences in future . . . and, whereas we further rightly and duly proceeding in the said cause did order and direct the said J. Bell Cox to be further admonished for the future . . . we do, therefore, hereby authorize empower, and strictly enjoin and command you jointly and severally peremptorily to monish or cause to be monished the said J. Bell Cox, that he abstain for the future from the following practices, acts, matters, and things, that is to say, from using when officiating at the service for the celebration of the Holy Communion lighted candles on the Communion table, or on a ledge immediately over the said table as a matter of ceremony, and when such lighted candles are not wanted for the purpose of giving light; from mixing or causing to be mixed water with the sacramental wine used in the Holy Communion, and also administering or causing or permitting to be administered wine and water so mixed to the communicants when officiating as principal minister or celebrant in such service; from unlawfully kneeling and prostrating himself when reading the prayer of consecration . . . . in the said service for the administration of the Holy Communion; from bowing his head in a ceremonial

(1) On the same day on which this monition of December 31, 1885, was served on the defendant, there was served on him a suspension suspending him ab officio for six months from the time of publishing the suspension in the manner directed by the Court on the occasion when the suspension was decreed (December 11, 1885). The service of this suspension was held by the Court (April 8, 1886) to have been irregular, as hereafter stated.

manner towards a crucifix erected and being on the Communion table or in apparent connection therewith, and appearing to be part of such table, when officiating as the principal minister or celebrant in the said service; from making the sign of the Cross by the appropriate gesture for that purpose, when officiating in the said service, when giving the elements to the communicants, and also when pronouncing the Absolution; and also, when pronouncing the Benediction; from wearing divers dresses, vestments, or things other than and besides or instead of the habits appointed or allowed by law to be used in churches or chapels or perpetual curacies, and in particular an alb, a chasuble, a maniple, and a stole, when officiating in the said service for the administration of the Holy Communion; from causing to be said or sung, when officiating as the principal minister or celebrant in the said service for the administration of the Holy Communion, before the reception of the elements and immediately after the prayer of consecration, the words or hymn or prayer commonly known as the Agnus, that is to say, "O, Lamb of God, that takest away the sins of the world, have mercy upon us;" from washing in a ceremonial manner the cup used in the service for the administration of the Holy Communion, and drinking the water with which the cup is washed when officiating as principal minister or celebrant in the said service; and from ceremoniously and unlawfully kissing the book from which the Gospel is read, when officiating in such service as principal minister or celebrant, and immediately after reading the Gospel of the day, under pain of the law and contempt thereof.

The defendant disobeyed this monition of December 31, 1885; and steps having been taken by the promoter in conformity with the Rules of the Chancery Court of York of September, 1885 (1), to bring this disobedience to the notice of the Court, one of the surrogates of the Official Principal, by direction of the Official Principal, delivered the following judgment, sitting in Court at York on April 8, 1886:—

It appears from the proceedings and affidavits in this case that on Sunday, January 10, in this year, the respondent was again guilty of the same illegal practices in the conduct of Divine service which have been proved against him in this suit, and which he has been twice admonished not to repeat, and the Court is prayed that the monitions may be enforced by such ecclesiastical punishment as the exigency of the case requires. But for a circumstance to which I am about to call attention, it would not, in my opinion, have been right or fitting to decree the issue of any fresh censure against the respondent for disobedience to either of the monitions. For the Court has already decreed a

(1) These rules are printed (11 P. D. 183), and their validity was discussed in the following cases: *Noble* v. *Ahier* (11 P. D. 158); *Cox* v. *Hakes* (not reported, but referred to in *Ex parte Cox*, 19 Q. B. D. 307, at pp. 317, 321).

1892

HAKES v. COX.

suspension ab officio against the respondent for six months, and while that decree remained in force against him he was guilty of a greater ecclesiastical offence in performing the services of the Church at all than in performing them in an illegal manner, and certainly the Court would not be disposed to issue a second suspension (which is the only ecclesiastical censure applicable to the case in this suit), while the first suspension was in force and contemptuously disobeyed. But I see from the certificate of service indorsed on the suspension, and from the affidavit of Mr. Lowndes, that the personal service of the decree of suspension upon the respondent was irregular, inasmuch as the decree was ordered to be served on January 3, and it was inadvertently served on January 2. This might not perhaps have much affected the validity of the service had it not been that the duration of the suspension is made to run from the date of service, and the suspension would, therefore, appear to run from January 2, whereas the order was for a suspension commencing on the 3rd of the same month.

If any further proceedings are taken against the respondent in this suit, it can only be by way of significavit with a view to his imprisonment for setting the decree of the Court at defiance, and in that manner enforcing the order that he should abstain for a limited period from the discharge of all the functions of his clerical office. To obviate the possibility of any legal question being raised in reference to the above irregularity, should any such further proceedings be taken, the Court is willing to pass by its former decree of suspension, and order a fresh decree of suspension for six months to issue, founded upon the respondent's disobedience to the monition of December 31, 1885. The issue of this decree will be accompanied, according to the ancient practice of this Court, with a fresh monition against the same illegal practices. The respondent must pay the costs of this application, but it will be right in taxing them that the registrar should see that the costs of the abortive service of the former suspension do not fall upon him.

Subsequently, on June 7, 1886, a suspension of the defendant ab officio for six months, to commence from the time of publi-

cation, issued in pursuance of this judgment of April 8, 1886, and was duly published on June 13, 1886, and served on the defendant the same day, together with a monition dated June 7, 1886, which mutatis mutandis was substantially the same, except in one respect (1), as the monition of December 31, 1885. No obedience was paid by the defendant to the last-mentioned suspension; and the promoter having proved to the Court that on Sunday, June 20, 1886, while the suspension was in force, the defendant had officiated in the performance of Divine service in the church of St. Margaret, Toxteth Park, the Official Principal, by a surrogate sitting at York, on July 30, 1886, and acting under his directions, pronounced the defendant guilty of contempt in disobeying the suspension of June 7, 1886, and directed such contempt to be signified to the Queen in Chancery, and significavit under seal to be issued in due form.

Accordingly, on August 5, 1886, significavit issued, dated that day, and on or about August 7, 1886, was handed into the Office of the Petty Bag in Chancery.

In the meantime the defendant had caused an application to be made to the Queen's Bench Division for a writ of prohibition prohibiting any further proceedings in the suit on the ground of want of jurisdiction, and had on August 5, 1886, obtained a rule nisi calling upon the Official Principal, the surrogate who had acted in the suit on July 30, 1886, the registrar of this Court, and James Hakes, to shew cause why such writ of prohibition should not issue. (2) Notice of this rule nisi having been given to the promoter on August 7, 1886, no further steps were taken on his behalf with a view to the imprisonment of the defendant as contumacious and in contempt until March 11, 1887; whilst on September 23, 1886, on the application of the proctor for the promoter, a surrogate made an order in the suit that, by reason of certain proceedings having been commenced and being then depending in the Court of Queen's Bench relative to and in

(1) The monition of June 7, 1866, did not admonish the defendant to abstain for the future from "in the service of the administration of the Holy Communion, and immediately after reading the Gospel for the day, ceremoniously and unlawfully kissing the book from which the Gospel had been read."

(2) See *Ex parte Cox*, 19 Q. B. D. at p. 308.

1892

HAKES v. COX.

connection with the suit, the dependence of the suit should stand during such proceedings. (1) The above-mentioned rule nisi for a prohibition was discharged by the Queen's Bench Division on March 11, 1887, and an appeal by the defendant to the Court of Appeal having been dismissed on or about April 28, 1887, the promoter proceeded to take the further steps necessary to obtain a writ de contumace capiendo; and ultimately the defendant was, on May 4, 1887, arrested and placed in the gaol of Walton-on-the-Hill. Thereupon, on an application on behalf of the defendant, the Queen's Bench Division granted a rule nisi for a habeas corpus to shew cause why he should not be discharged from custody; and on May 20, 1887, that Court, after argument, made the rule absolute (2), and the same day the defendant was released.

On appeal on behalf of the promoter, the Court of Appeal set aside the rule so made absolute (3); but on the case being taken on a further appeal to the House of Lords, this decision of the Court of Appeal was, on August 7, 1890, reversed. (4)

On March 12, 1891, there was served on the defendant a notice with statement, giving the defendant notice that it was alleged on behalf of the promoter that the defendant had disobeyed the monitions issued in the suit on August 19, 1885, December 31, 1885, and June 7, 1886, and served on him on September 5, 1885, January 2, 1886, and June 13, 1886, respectively; and further notice that the particular facts or conduct of the defendant which

(1) The proceedings referred to in the above order were the proceedings commenced by the application for a writ of prohibition as above mentioned; and, such proceedings having ended by July 21, 1887, the next step in the suit was taken on that day by the proctor for the promoter, accusing the defendant of contumacy and praying to be assigned to exhibit a further bill of costs on the suit. After entries of sundry proceedings in the suit down to January 19, 1888, for the most part with respect to costs or the continuation of the certificates of monitions previously issued, there is among the minutes relating to the suit the following entry in the Court Minute Book, under the date of March 23, 1888: "Let it stand."

(2) The proceedings are reported nomine *Ex parte Cox*, 19 Q. B. D. 307.

(3) Reported 20 Q. B. D. 1.

(4) The ground of the decision of the House of Lords was that, as Mr. Cox had been discharged from custody by an order of the High Court under a writ of habeas corpus, the Court of Appeal had had no jurisdiction to entertain an appeal from such order: see *Cox* v. *Hakes* (15 App. Cas. 506).

were charged as constituting disobedience to all and each of the said monitions and to the monitions of August 19, 1885, and December 31, 1885, respectively, were as therein stated, namely, the doing certain acts, matters, and things on Sunday, October 19, 1890, when officiating at the service of the administration of the Holy Communion, in the church of St. Margaret, Toxteth Park; all such practices, acts, matters, and things being, with one exception, repetitions of certain of the practices, acts, matters, and things from which he had been admonished to abstain by all the said monitions, and the remaining one of such practices, acts, matters, or things, being a practice, act, matter, or thing from which he had been admonished to abstain by the monitions of August 19, 1885, and December 31, 1885, and that on the Court day which should happen next after the expiration of fourteen clear days from the service of such notice with statement, the promoter would make an application to the Court to enforce obedience to the said monitions. Together with this notice with statement, copies of two affidavits intended to be used in support of the application were served on the defendant. (1) One of such affidavits stated in detail what were the particular facts and conduct of the defendant on Sunday, October 19, 1890, which were complained of as constituting the disobedience sought to be brought to the notice of the Court (2); and in the other of such affidavits the solicitor for the promoter deposed to the steps in the suit which had led to the defendant's arrest and imprisonment under the writ de contumace capiendo, to his release and to the above-mentioned proceedings in the High Court of Justice, the Court of Appeal, and the House of Lords, which had taken place in connection with and relative to the suit.

1891. April 9. The solicitor for the promoter appeared on his behalf before one of the surrogates of the Official Principal

(1) See the Rules of September, 1885 (11 P. D. 183).

(2) All the practices, matters, and things from which the defendant had been admonished to abstain by the monition of December 31, 1885, appeared from this affidavit to have been repeated by him on October 19, 1890, except the following: "The mixing water with the sacramental wine used in the Holy Communion, and the administering, or causing to be administered, wine and water so mixed to the communicants."

1892

HAKES v. COX.

sitting in Court at York, and applied that obedience to the monitions of August 19, 1885, December 31, 1885, and June 7, 1886, might be enforced by the Court. (1)

An appearance in the suit had never been entered in the registry on behalf of the defendant, and on the application he neither appeared personally, nor was represented by counsel, or a proctor or solicitor. Further, there was not tendered to the Court either a statement of any dispute raised by him as to the truth of any of the facts alleged on behalf of the promoter, or any affidavit or affidavits in support of any such dispute, or of any grounds upon which he opposed the application being granted. (2)

On the solicitor for the promoter praying that the application might be granted, the surrogate adjourned the Court for the decision of the Official Principal on the application to be given at a subsequent sitting of the Court. (3)

Cur. adv. vult.

On November 12, 1891, *Blakesley*, on behalf of the promoter, attended before the Official Principal in chambers in London, in support of the application, and was invited by his Lordship to address himself to the question whether, having regard to the time which had elapsed since the date of the monitions of December 31, 1885, and June 7, 1886, such monitions were enforceable, and ought to be enforced by means of any exercise of the punitive powers of the Court in the suit.

[He admitted that it was in the discretion of the Official Principal either to grant or to refuse the application; but contended that, in the exercise of that discretion, the application ought to be granted; the enforcement of the monitions not having been sooner applied for owing entirely to the pendency of the proceedings in the civil Courts relative to and in connec-

(1) Copies of the above-mentionod notice with statement, and the originals of the affidavits in support of the application, had been previously deposited in the registry as required by the Rules of Court of September, 1885.

(2) See the Rules of Court of September, 1885 (11 P. D. 183).

(3) The fact of this adjournment having taken place is stated in the Court book as follows: "To hear the will of the judge."

tion with the suit, and the deference paid by the promoter to such proceedings. He also stated that he had not been able to find any reported case bearing on the question.]

1892. Jan. 14. The case was called on before a surrogate of the Official Principal sitting in Court at York, who, after the defendant had been thrice called into Court, on his not appearing either in person, or by counsel, proctor, or solicitor, delivered the following judgment of the Official Principal:—

In the year 1885 a suit was instituted by letters of request in this Court against the Rev. James Bell Cox in respect of certain illegal practices in the performance of Divine service. He refused to appear in the suit, and the practices complained of were fully proved against him. The Court admonished him to discontinue his illegal conduct. He paid no respect to this admonition, and, upon proof that he had continued to offend, he was suspended from his office for a period of six months. This was on June 7, 1886. Having wholly disregarded the order of the Court, he was on July 30 following pronounced in contempt, and the proper proceedings were then taken with a view to his imprisonment.

At this stage of the suit the Court of common law intervened by granting a rule nisi for a writ of prohibition. In deference to this rule the legal advisers of the promoter forebore to issue the writ of attachment for the defendant's arrest, although no writ of prohibition had been issued or ordered to be issued.

On September 23, 1886, an order was made in this Court that "by reason of certain proceedings having been commenced, and being now depending in the Court of Queen's Bench, relative to and in connection with this suit, the dependence of the cause may stand pending such proceedings." When the rule nisi for a prohibition came to be argued, it turned out that there was no ground for issuing any prohibition; the rule nisi was discharged, and the proceedings in the Queen's Bench Division, to which the above order made in this Court referred, came to an end. This was on March 11, 1887. But in the meanwhile the six months' suspension had run out, and the arrest of Mr. Cox had become no longer legal. He was, nevertheless, arrested, but

1892

HAKES v. COX.

promptly discharged by the Queen's Bench Division upon a writ of habeas corpus. Their judgment was upheld by the House of Lords. The suit had thus practically failed, and failed in consequence of the abortive proceedings taken in the temporal Court.

Mr. Cox's discharge from custody took place on May 20, 1887. From that time till October 19, 1890, there is no allegation of any misconduct on his part. Judging from his conduct in the past and his refusal to submit to the authority of this Court, it is not, perhaps, likely that he has at any time altered his previous course; but I have no right to assume that he has continued to violate the law.

On October 19, 1890, he is now sworn to have repeated some, if not all, of his original offences; and the object of the present application is that the Court should enforce against him certain admonitions which have been addressed to him in the course of the suit. One is of December 31, 1885, before the date of his suspension; and another, the most important, bears the date of June 7, 1886, which was the date of his suspension, and was served upon him together with that decree. The question is whether this application (admittedly to the discretion of this Court) is one which ought to be granted. No doubt the admonition is in general terms, and admonishes the defendant to refrain from certain illegal practices in future, without any expressed limit of time as to its operation. And if the Court is at liberty to regard it as a sort of "perpetual injunction" forbidding the defendant, at any time in the course of his life, to resort to the practices complained of under pain of being pronounced in contempt, there may be some ground for the present application. But I have a difficulty in so regarding it. This admonition of June 7, 1886, was issued at the same time as the suspension, in conformity with the ancient practice of the Ecclesiastical Courts always to add to a censure such as a "suspension," inflicted as a punishment for past offences, an admonition not to repeat them.

Unfortunately there are no records in the Ecclesiastical Courts which throw any light upon the way in which these admonitions have been hitherto regarded or treated. I asked in vain of the learned counsel who appeared in support of the present applica-

tion if he could furnish me with any authority that would justify the Court in granting it.

I must, therefore, consider for myself what effect should be given to an admonition such as the present.

That it should not be treated as of no force or effect may be conceded. I cannot doubt that if, upon the expiration of a sentence of suspension a defendant forthwith were to repeat his offences, it would be competent to the Court and proper to enforce such an admonition by a second suspension or significavit, provided always that a prompt application were made to the Court for that purpose.

On the other hand, if a defendant should discontinue his illegal practices, perhaps for years, and should then violate the law again, the proper mode of dealing with such a case would be, I think, to commence a fresh suit against him, provided, that is, that his bishop thought it right that any further proceedings should be taken. The controlling authority and judgment of the bishop in such matters were fully maintained by the House of Lords in *Julius* v. *The Bishop of Oxford* (1), and one result of the present application, if granted, would be to deprive the bishop of all voice in the matter.

This is a serious consideration. Many circumstances may exist which would disincline the bishop to give his sanction to the institution of further proceedings. At any rate, he is the constituted authority for the exercise of discretion and judgment on the subject in the best interests of the parish and the church, and the Court should be chary of sanctioning a method of proceeding which renders the opinion of the bishop, whatever it may be, nugatory.

No doubt the suit is not formally at an end. In accordance with the old practice in the Ecclesiastical Courts a suit in this Court is called on, and continued over from Court day to Court day until the costs are paid—very much after the fashion of the old "continuando" in actions at common law—and this is what has taken place in the present case; but it throws no light, I think, on the question I have to determine.

The result then is this. A period of upwards of six years has

(1) 5 App. Cas. 214.

1892

HAKES v. COX.

elapsed since his bishop authorized proceedings against Mr. Cox in this Court, and it is nearly five years since those proceedings resulted in a decree of suspension. If the coercive authority of this Court is to be further invoked against Mr. Cox by reason of his conduct in October, 1890, it ought, I think, to be done by means of a fresh suit under the bishop's sanction, and the present application must be refused. (1)

Proctor for promoter: *Lawton.* Solicitor for promoter: *Girdlestone.*

C. F. J.

1892

March 11, 12.

THE LEPANTO.

Admiralty—Salvage—Agreement to endeavour to Tow — Payment for Work done—Derelict—Practice—Costs.

A steam trawler made an agreement with a disabled barque to tow her for a given sum to a named port. During the towage the weather became rapidly bad, and the foremast of the barque falling overboard, the wreckage increased the difficulty. Thereupon the master of the steam trawler declined to be bound by the agreed sum; but it was arranged that he should endeavour to tow, and do the best he could, at a remuneration to be settled on shore. The steam trawler proved of insufficient power to tow effectually, and, on the rope breaking, the barque was nearly ashore. The trawler, however, made a successful effort to get hold of her again, and towed her out of immediate danger; but, being short of coal, subsequently left the barque in a more dangerous position than when she picked her up, though with a second set of salvors in attendance who ultimately towed the barque into port.

In an action of salvage against the owners of the barque :—

Held, that the steam trawler was not entitled to salvage, she having con-

---

(1) The minute of the proceedings on the occasion when the above judgment was delivered, as entered by the registrar in the Court Book, was, so far as material, as follows: "Hilary Term, to wit, Thursday, January 14, 1892, before the Rev. E. S. Carter, Clerk, M.A., Surrogate of the Right Honourable James Plaisted Baron Penzance, Official Principal and Auditor of the Chancery Court of York, in the presence of me, H. A. Hudson, Registrar. Defendant thrice called, and not appearing, Lawton (substitute for Girdlestone) accused his contumacy, and then prayed and petitioned as before, and that the defendant may be pronounced contumacious and condemned in the costs of these proceedings, and that judgment might be given. The surrogate, by direction of the judge, pronounced the following judgment." [Here follows, as part of the minute, a copy of the above judgment.] . . . The certificates of the monitions for payment of the sums taxed are continued.

ferred no actual benefit on the salved property; but (following *The Benlarig*, 14 P. D. 3) that she was entitled to some payment for work done under the agreement to endeavour to tow.

The second set of salvors consisted of two steam trawlers, on board of one of which the crew of the barque went, and there remained throughout the towage by the two trawlers, who, between them, made up a salvage crew to pump and steer the barque whilst towing her to a port of safety.

The second set of salvors, by their counsel, claimed salvage remuneration on the high scale usual where the vessel is a derelict:—

Held, that as the crew of the barque were on board her at the time the salvage services commenced, and remained by her throughout the salvage operations, the barque could not, for the purpose of fixing the amount of the salvage reward, be treated as abandoned.

CONSOLIDATED ACTIONS OF SALVAGE. The plaintiffs were the owners, masters, and crews of the steam trawlers *Tyne Fisher* and *Chindwin* (having the conduct of the action), and the owners, master, and crew of the steam trawler *Florence*. The defendants were the owners of the *Lepanto*, her cargo, and freight.

The material facts were: On January 2, 1892, about 6 P.M., the Italian barque *Lepanto*—of 862 tons net register, a crew of fourteen hands, and a North Sea pilot, with a cargo of 1400 tons of coal from South Shields to Genoa—was in the North Sea, about seven or eight miles off Seaham, on the Durham coast, when she came into collision with the steamship *Lutetia*, thereby losing her bowsprit, and otherwise sustaining considerable damage.

On the following morning, about 5 o'clock, the steam paddle trawler *Florence*, of Sunderland, 42 tons register, 65 horse-power nominal, working up to 70, and manned by a crew of seven hands, was fishing, with Hartlepool light bearing about W. by S. seven miles, when those on board observed signals of distress about one and a half miles off on the weather beam. There was at the time a strong north-westerly breeze and some sea. The *Florence* hove up her trawl, proceeded in the direction of the flares, and found that they were being burnt by the *Lepanto*. On hailing that vessel, those on board her asked to be towed to the Tyne; and according to the statement of claim, "the master of the *Florence* agreed to attempt to tow her to the Tyne for the sum of 80*l*."; but, on the evidence, the agreement appeared to be, to tow to the Tyne for the above-mentioned sum. After

1892

THE LEPANTO.

some delay a hawser was got on board the *Florence*, and she commenced to tow the *Lepanto* N.N.E.; but, after some hours, finding that, owing to the wind getting more northerly and increasing, she could not make that course, the *Florence* determined to turn westward. She, therefore, about 11 A.M. signalled to the *Lepanto* to stow her topsails. In coming head to wind, however, owing to the extensive damage she had received, the foremast of the *Lepanto* fell over the side, and the wreckage of the mast and rigging became a source of danger to the vessel in the heavy sea, and rendered the towage difficult. It was also seen that the crew of the *Lepanto* were labouring at the pumps. Under these circumstances, the master of the *Florence* brought his vessel as near the *Lepanto* as he safely could, and hailed those on board the latter that he could no longer continue to tow for the above-mentioned sum, and it was ultimately agreed that he should remain by the *Lepanto*, endeavour to tow her, and do the best he could, for a remuneration to be settled on shore.

The *Florence* now towed for about one hour when the rope parted, and shortly after another rope also parted, with the result that the *Lepanto* drifted rapidly to leeward. The trawl warp of the *Florence* was now made fast, and about 7 P.M., when the Tees light was made out, the course was altered to N.W., with a view of putting into Hartlepool; but in about half an hour the rope parted for the third time. The *Florence*, having no more ropes, stood by; but observing that the barque was drifting towards the rocks in the vicinity of Redcar, and that the water had shoaled to fifteen fathoms, the *Florence* was backed astern, and, at considerable risk, the broken end of their warp, which was still fast to the *Lepanto*, was got on board the *Florence*, and the barque towed to the eastward out of immediate danger.

At daylight on January 4, as the tow-rope again parted, the *Lepanto* accepted the services of the steamer *Harraton*, and by 11 A.M. both the *Florence* and the *Harraton* were towing in a northerly direction, making very bad weather of it, the wind and sea being both high from the N.N.E., and, after a time, the tow rope of the *Harraton* parted. In endeavouring to get fast again she came into collision with the *Lepanto*, and then drifted down upon the *Florence*, rendering it necessary for the latter to slip

1892

THE LEPANTO.

her tow-rope. The *Harraton* then gave up the attempt to tow and steamed away. In the meantime, the *Tyne Fisher*—a steam trawler of North Shields, sixteen tons net register, with engines of forty-eight horse-power nominal, and a crew of eight hands—had come up, and about 3.30 P.M., when about nine miles N.E. of Whitby, the master of the *Florence*, being short of coals, determined to run into Sunderland, leaving the *Lepanto* about nineteen miles S.E. of the place where she was picked up. The *Tyne Fisher* now proceeded to take the *Lepanto* in tow. Before, however, a rope could be made fast, the barque drifted considerably to leeward, and it was not until 4 P.M. that towage began, at first in an E.S.E. direction to clear the land round Whitby, and then S.E. b. S. and afterwards S.S.E. along the land. At 10.30 P.M., when Scarborough was bearing about W. b. S. nine miles, the rope broke; but, in the course of an hour, another rope was made fast, and the vessels proceeded in a S.S.W. direction till 6.30 A.M. on January 5, when the hawser again parted. The wind at this time was blowing hard from the S.W. with a heavy cross sea, and (it was alleged) the crew of the *Lepanto* refused to take another rope, and hailed the *Tyne Fisher* that they wished to abandon their vessel, as she was making water fast. About 9.30 A.M., when about eight miles E.N.E. of Flamborough Head, the crew of the *Lepanto* launched their lifeboat, and, with the pilot, were with some difficulty got on board the *Tyne Fisher*. The latter vessel then lay by the *Lepanto*, both vessels driving before the gale in an easterly direction, till 7 P.M., when, about forty miles N.E. of the Spurn, the *Chindwin*—a steam trawler belonging to Hull, fifty-nine tons net register, with engines of forty-five horse-power nominal, and a crew of nine hands—came up, but the wind and sea were too high for anything to be attempted, and it was not until 7.30 A.M., on January 7, that a boat from the *Chindwin*, with two men from that vessel and three men from the *Tyne Fisher*, boarded the *Lepanto* and found twenty-two inches of water in her. Some of these men employed themselves in pumping and one man took the wheel, whilst a hawser from the *Chindwin* was made fast, and subsequently the trawl warp of the *Tyne Fisher* was got on board. About 11 A.M. both trawlers began towing towards the Humber, the vessels

1892

THE LEPANTO.

being then about sixty miles E. b. S. of the Spurn. About 9 P.M., when they were about eighteen miles E. b. S. of the Spurn, the rope of the *Tyne Fisher* parted, but was made fast again, and Spurn Head was reached about midnight, when, the weather being too thick to proceed, the *Tyne Fisher* let go, and the *Chindwin* held the barque against the ebb tide. At 7 A.M. on the 8th the *Tyne Fisher* again took hold, and the two trawlers towed the *Lepanto* up the Humber until, at 9 A.M., the tug *Seagull* was engaged for 5*l.* to dock her at Hull, and the trawlers left.

By their defence the defendants admitted that salvage services were rendered to the *Lepanto* by the *Tyne Fisher* and *Chindwin*, but denied that any salvage services were rendered by the *Florence*, and with regard to the alleged agreement to tow, pleaded that "the steam trawler *Florence* was engaged to tow the *Lepanto* into South Shields," and "the *Florence* having made fast, attempted to tow the *Lepanto* to South Shields, but not being of sufficient power she was unable to do so;" and the defendants further pleaded that "the *Florence* did not render any beneficial services to the *Lepanto*. The place where the *Florence* abandoned the *Lepanto* was a worse position than that in which she was when first taken in tow, and the defendants submit that in the circumstances the owners, master, and crew of the *Florence* are not entitled to any salvage remuneration." As to the abandonment of the *Lepanto* by her crew, the defendants denied this, and alleged "that they asked to be allowed to return, but that the salvors refused to allow them."

The values were—of the salvors—*Florence*, 2400*l.*, *Tyne Fisher* and *Chindwin*, each 4500*l.*; of the salved vessel, 1405*l.* viz.: *Lepanto* (in her damaged condition) agreed at 905*l.*, cargo, when brought into port at Hull, 500*l.*, freight 385*l.*, but net pro rata from Shields to the Humber nil, as, though estimated at 35*l.*, this was subject to cost of transhipping and incidental expenses.

F. Laing, for the plaintiffs, the owners, master, and crew of the *Florence*. This trawler was first in the field, and the effect of the evidence is to shew that it was only the amount that was struck out of the agreement, and that, in other respects, the

original agreement remained, so that the *Florence* undertook to continue towing at a remuneration to be settled on shore. The *Florence* is, therefore, entitled to be paid for work and labour done in pursuance of the contract to endeavour to tow towards a port, and from this point of view it is immaterial that her efforts were unsuccessful: *The Benlarig.* (1) The *Florence* is, however, entitled to remuneration on a salvage scale because, when the rope parted off Redcar, she, at considerable risk to herself, saved the *Lepanto* from going on the rocks, and subsequently brought her into a position where she could be taken hold of by the *Tyne Fisher* and *Chindwin*, so that—even if temporarily leaving the *Lepanto*, in order to get coal, is to be deemed an abandonment, still—through the efforts of the *Florence*, the *Lepanto* was brought into a better position and ultimately saved: *The Camellia.* (2) The services lasted two and a half days, the trawl warp of the *Florence* was lost, as it was cut away by the *Lepanto* when it parted, and the crew of the trawler depend for their wages on the fishing done, and this was all lost during the time occupied in the efforts to save the *Lepanto* and her cargo.

Sir Walter Phillimore and *J. P. Aspinall*, for the plaintiffs, the owners, masters, and crews of the *Tyne Fisher* and *Chindwin*. The crew of the *Lepanto* became demoralised by the labour they had undergone, and fearing that the vessel would go down under them, or drift ashore, they refused to take the rope of the *Tyne Fisher*, came on board that trawler, and declined to go back. They, in fact, abandoned their vessel to the salvors, who, at great risk, saved the derelict from drifting ashore and becoming a total wreck. Under these circumstances the practice of the Court has been to award half the value of the salved property, and, in addition, the damage to the hawsers, and the loss of fishing, has to be taken into account.

Pyke, Q.C., and *Butler Aspinall*, for the defendants, the owners of the *Lepanto*. As regards the first set of salvors, if the *Florence* had entered into a specific agreement to do certain work, and had performed part of it for the benefit of the *Lepanto*, no doubt she would be entitled to a quantum meruit at common law; but even if the agreement set out in the pleadings to

(1) 14 P. D. 3. (2) 9 P. D. 27.

1892

THE LEPANTO.

attempt to tow for 80*l.* had been proved, it was admittedly put an end to. The fact is, as the evidence shews, that the *Florence* thought she could tow to a port, and intended to do so, but was of insufficient power; and if any further agreement was entered into, it amounted to no more than that usually understood in salvage cases—viz., to perform certain work which, if successful, is to be substantially rewarded. In order, however, to found a salvage claim, it must be established that some actual benefit was conferred on the salved property: *The India.* (1) But the *Florence* conferred no benefit on the *Lepanto*, as she left the barque in a much worse position than when the towage began; and as she in no way contributed to her safety, no salvage has been earned: *The Edward Hawkins.* (2) Again, no salvage claim can be based on the alleged service performed off Redcar, because the *Lepanto* was drifting out to sea in comparative safety, when the *Florence* took hold of her, and the latter vessel towed her inshore, so that, when the rope broke, she was in a dangerous position through the act of the salvor, and was subsequently abandoned without any benefit whatever.

As to the second set of salvors, their remuneration cannot be based on the high scale contended for, as in no case has it been held that a vessel is abandoned when the crew are on board at the time the salvage services commence, and remain by throughout the services.

JEUNE, J. [After referring to the facts up to the time of the *Florence* leaving the *Lepanto*, proceeded:—] Now, I have to consider what was the value of the services of the *Florence*. One has to keep quite clear, first, the claim for salvage per se; and, secondly, any claim that may be founded upon an agreement, as, apart from salvage remuneration, there may be an agreement entitling to reward, although not on strict salvage principles. Now, is the *Florence* entitled to salvage reward apart from any agreement? To obtain remuneration of that kind two things appear to be clearly necessary: first, that the property in danger or part of it (I am not, of course, referring to life salvage) should be eventually saved, which is the case here; and, secondly,

(1) 1 Wm. Rob. 406. (2) Lush. 515; 15 Moo. P. C. C. 486.

1892

THE LEPANTO

[Jeune, J.

that the salvor, claiming remuneration for salvage, should have done useful and effectual service towards that end. Was such service in this case rendered by the *Florence*? On this point what one has to consider is, what was the position of the *Lepanto* when she was found by the *Florence*, as compared with the position of the *Lepanto* when she was left by her. On that point I have consulted the Trinity Masters, and they are clearly—I think I may say strongly—of opinion that the position of the *Lepanto* when she was left was worse, and not better, than her position when she was found. Something depends, no doubt, upon the decision as to what her exact place was when she was left, as to which there is a conflict of evidence between the *Tyne Fisher* and the *Florence*. On the whole, the Trinity Masters and I agree rather with the view of the *Tyne Fisher* than with that of the *Florence*. We think she was left nearer to the shore than the *Florence* would put her. If that was so, that aggravates the case against the *Florence*; but I am inclined to think that, even taking the view of the *Florence*, and assuming her story to be true, the position of the *Lepanto* eventually was worse than it was originally, inasmuch as she was several miles further from the Tyne and the Tees. In these circumstances, it is impossible to say that the *Florence* benefited her as a question of salvage service, because one cannot take into consideration the intermediate service in getting her off Redcar. Why it was that the *Florence* was unable to do better service is pretty clear. Her steam-power, though worked to its full extent, was inadequate; and it was because she was deficient in that respect that her services were not useful to the defendants. Then comes a further question, with regard to which I am referred to the case of the *Benlarig* (1), where the circumstances were not altogether dissimilar to these, and which lays down principles applicable to this case. Was there any agreement, and if so, what was it? There were two agreements. In the first place, there was an agreement, which in this point of view is not material, as it was rescinded by the substitution of another—an agreement for 80*l.* to tow to South Shields. On the pleadings, it is stated by the one side that it was an agreement to endeavour to tow, and in

(1) 14 P. D. 3.

1892

THE LEPANTO.

Jeune, J.

the defence that is contradicted, and it is put as an agreement to tow to a definite place. The evidence of the master appeared to me to point to an agreement to tow to a specified place; and the fact that the amount was fixed seems, though not conclusively, to point to that. I must therefore, if necessary, decide that the agreement was to tow to a definite place, and if so, it was not fulfilled. What was the agreement afterwards? I cannot help thinking that it was a very different thing, and that when the *Florence* found that she was unable to accomplish that which she had undertaken, there was an agreement with the *Lepanto* that she should endeavour to tow her, and do the best she could for her, for a price to be fixed when they got ashore. Such an agreement is, indeed, admitted on the pleadings. On that agreement I think I am justified in acting; but I must say, in accepting that view of things, I can only accept it as a whole. That involves two consequences: first, that the services before that agreement are services which cannot be brought into account; secondly, that the remuneration cannot be considered on what I may call the strict salvage scale, because one of the main reasons why salvage remuneration is so high is, that it involves this, that unless some of the property is saved, no remuneration is obtainable at all. Looking at these considerations, I think, after consultation with the Trinity Masters, the utmost sum which it is possible to give to the *Florence* is 75*l.*

As regards the other two vessels, the considerations applying to them are more important as regards the amount, but much more simple. We have a vessel, the *Lepanto*, which was not derelict, and was not abandoned. In a certain sense, no doubt, she was abandoned—that is to say, left by her crew, who were thoroughly worn out; but she was not derelict in the sense that her crew had gone off to leave her to fare as best she might. Though they had left her, in a certain sense, in the hands of the salvors, they had not left the scene, and she cannot be considered an abandoned vessel for the purpose of fixing an extreme measure of compensation against her. The services rendered by the *Tyne Fisher* and the *Chindwin* appear to us to have been highly meritorious. I do not think the danger to the vessel was so high as it has been put. Having regard to the

direction of the wind, and also to the fact of the possibility of her anchoring, the Trinity Masters and I think that the *Lepanto* was in no very imminent peril of going ashore. But she was in a position of danger. She had lost her foremast, and her ropes were gone. She was in a position of danger to herself, and if she had not been rescued she would have been in a position of danger to navigation. At the same time, she was not in a position of imminent peril. She rode out the storm of the 6th in safety, though her crew were not on board, and there seems no reason to think that, if the *Tyne Fisher* and *Chindwin* had not found her, some other vessel would not have done so, as the place is almost a highway of vessels. Still, the service of the *Tyne Fisher* was a highly meritorious one, well performed under circumstances of considerable danger, and aggravated by the necessity, as was the case also with the *Chindwin*, of being obliged to send men on board after the vessel had been left by her own crew, under circumstances of difficulty and danger. The service was successfully rendered, and the vessel was brought into port. We think, under these circumstances, that the *Tyne Fisher* and the *Chindwin* are entitled to a substantial sum, though not such a sum as they would have been entitled to had the property saved been of much greater value than it is, or had there been imminent peril, or had the vessel been in the strict sense of the word abandoned.

I award 500*l.* to the two trawlers, and apportion it as follows: 275*l.* to the *Tyne Fisher*, and a sum rather less—225*l.*—to the *Chindwin*, owing to the less time she was occupied. This will make a total of 575*l.* to the three trawlers.

On the question of costs:—

F. Laing, for the *Florence*. The owners, master, and crew of this trawler commenced their action in the Hull County Court; but the defendants applied for and obtained an order transferring the action to the High Court, and consolidating it with that of the other salvors. The plaintiffs, the owners of the *Florence*, submit, therefore, that the costs of the *Florence* should be allowed on the High Court scale, and as there was an absolute conflict between

1892

THE LEPANTO.

the cases of the two sets of salvors who are plaintiffs in this action, the *Florence* was entitled to separate counsel.

JEUNE, J. As the defendants brought the *Florence* here, costs will be allowed her on the High Court scale, and as there was considerable conflict between the cases set up by the rival salvors, the *Florence* will be allowed the costs of being represented by one counsel.

Solicitors for the owners, master, and crew of the *Florence*: *Botterell & Roche, for Hearfields & Lambert, Hull.*

Solicitors for the owners, masters, and crews of the *Tyne Fisher* and *Chindwin*: *Pritchard & Sons, for A. M. Jackson & Co., Hull.*

Solicitors for defendants: *Rollit & Sons, for R. W. E. Whitehead, Hull.*

T. L. M.

1891
Nov. 20, 21; *Dec.* 8.
1892
April 1, 2.

THE CARL XV.

Admiralty—Collision — Compulsory Pilotage—Draught of Water—Merchant Shipping Act, 1854, *ss.* 2, 388—*Order in Council, May* 1, 1855, *Regulation* 4—*Practice—Costs.*

By s. 388 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), "No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law." By the interpretation clause (s. 2) of the Act, the words "qualified pilot" shall "mean any person duly licensed by any pilotage authority to conduct ships to which he does not belong." By the 4th of the Regulations approved by, and annexed to, the Order in Council, May 1, 1855, "No person licensed as a pilot for the London district . . . . shall take charge as such of any ship drawing more than fourteen feet water, in the river Thames or Medway, or any of the channels leading thereto or therefrom, until such person shall have acted as a licensed pilot for three years, and shall have been after such three years, on re-examination, approved of in that behalf by the said Trinity House, on pain of forfeiting 10*l.* for every such offence, unless there shall be no qualified pilot to be obtained who has passed the said examination for ships drawing more than fourteen feet water."

In an action of damage by collision the defendants denied that the collision (which took place in the London district) had been caused, or contributed to, by the negligent navigation of their vessel by themselves or their servants, and alleged that the negligence, if any, was that of the pilot, whose employ-

ment was compulsory, and they counter-claimed for damages for the alleged negligent navigation of the plaintiffs' vessel.

The Court found that the collision was caused solely by the negligence of the pilot of the defendants' vessel.

The pilot was not licensed to take charge of a vessel drawing more than fourteen feet water, and the draught of water of the defendants' vessel exceeded that depth; but it was admitted that, when the pilot went on board, there was no pilot to be obtained licensed to conduct ships drawing more than fourteen feet:—

Held, that the Order in Council, taken in conjunction with the other enactments, qualified the pilot pro hac vice to conduct ships of a greater draught than fourteen feet.

The plea of compulsory pilotage was therefore sustained, the plaintiffs' action dismissed, each party bearing their own costs; but the defendants were ordered to pay any costs occasioned by their counter-claim.

ACTION of damage by collision. The plaintiffs were the owners of the steamship *Angelus*; the defendants, and counter-claimants, were the owners of the steamship *Carl XV.*

The facts—so far as material on the questions only of the defendants' plea of compulsory pilotage, and as to the costs of the counter-claim—were shortly as follows:—

On January 12, 1891, about 11.45 A.M., a collision occurred just above Cold Harbour Point, in Erith Reach, in the River Thames, between the steamship *Angelus*—of 460 tons register, 90 horse-power nominal, with a crew of sixteen hands, from the Tyne to London—and the *Carl XV.*, a Swedish steamship of 721 tons register, and a crew of eighteen hands, from Gothenburg to London, with a general cargo and nine passengers.

The plaintiffs, by their statement of claim, alleged that the collision was solely caused by the negligent navigation of the *Carl XV.*, by the defendants or their servants.

The defendants, by par. 14 of their defence, said that, "so far as the collision was caused or contributed to by any negligent navigation of the *Carl XV.*, which they deny, it was so occasioned solely by the fault of the pilot, who, being a duly licensed pilot for the district, was, by compulsion of law, in charge of the *Carl XV.*, all whose orders were duly obeyed by the servants of the defendants on board the *Carl XV.*," and by their counter-claim the defendants alleged that "the collision was wholly caused by the negligent navigation of the *Angelus*, by the plaintiffs or their servants."

1892

THE CARL XV.

On November 20 and 21 the action was tried before the President, assisted by two of the Elder Brethren of the Trinity House. In the course of the case the license of the pilot of the *Carl XV.* was put in by the plaintiffs. It was dated June 25, 1890, and the material portion was as follows: "We, the Trinity House . . . . do hereby appoint and license the said Joseph James Acland Mitchell to act as a pilot for the purpose of conducting ships from London Bridge down the river Thames to Gravesend, and back again to London Bridge, ... provided always that this license shall not authorize or empower the said Joseph James Acland Mitchell to take charge as a pilot of any ship or vessel drawing more than fourteen feet water in the river Thames or Medway, or any of the channels leading thereto or therefrom, until it shall be certified hereon that the said Joseph James Acland Mitchell has acted as a licensed pilot for three years, and has been, on re-examination, approved of in that behalf by us the said Trinity House."

The draught of water of the *Carl XV.* was 12 ft. 3 in. forward, and 16 ft. 9 in. aft, giving a mean draught of 14 ft. 6 in.; but when the pilot Mitchell boarded the vessel at Gravesend no pilot qualified for vessels drawing more than fourteen feet water was left for service.

The learned judge, after consultation with the Trinity Brethren, found that the collision between the *Angelus* and the *Carl XV.* was caused by the wrongful navigation of the latter vessel, but that there was no negligence on the part of her officers or crew causing or contributing to the collision, the fault being that of the pilot alone.

On this finding the defendants would have been entitled to judgment in their favour, if the pilot in charge of the *Carl XV.* was duly qualified. This point of law was reserved, and, on December 8, argued by

Barnes, Q.C., and *J. P. Aspinall*, for the plaintiffs, the owners of the *Angelus*. By s. 388 of the Merchant Shipping Act, 1854 (1),

(1) 17 & 18 Vict. c. 104, s. 388: "No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law."

the shipowner is only exempted from liability in the case of a qualified pilot whose employment is compulsory. This pilot, however, could only take charge of vessels not drawing more than fourteen feet water, and as the pilot is bound to produce his license to the master, the fact that he was not qualified might have been at once discovered. The employment of this pilot was therefore voluntary, and the defendants are liable for the damages to the plaintiffs.

[The following cases were referred to: *Hammond* v. *Blake* (1); *General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.* (2); *The Stettin* (3); *The Yorkshireman.* (4)

Sir Walter Phillimore, and *Stubbs,* for the defendants, the owners of the *Carl XV.* The defendants are not liable, for, on common law principles, Mitchell was not the servant of the defendants; he boarded the vessel from the regular pilot boat, and took charge in the usual way. Secondly, he falls within s. 388 of the Merchant Shipping Act, 1854, as read with the interpretation in s. 2 of the same Act (5), for, in the London district, he was a person duly licensed by the pilotage authority to conduct ships to which he did not belong. Thirdly, under the regulations approved by, and annexed to, the Order in Council of May 1, 1855 (6), he was absolutely qualified to conduct this ship, as, on the evidence, there was no qualified pilot to be obtained for ships drawing more than fourteen feet water.

Barnes, Q.C., in reply. The effect of the Order in Council is only to render the pilot not liable to a penalty if he conducts the ship in the absence of a qualified pilot, but his employment is not compulsory. The master of the *Carl XV.* could have refused to employ him, and have waited for a pilot qualified to conduct a ship drawing more than fourteen feet water.

Cur. adv. vult.

(1) 10 B. & C. 424.

(2) Law Rep. 4 Ex. 238.

(3) Br. & Lush. 199.

(4) *Shipping Gazette,* March 10, 1891.

(5) 17 & 18 Vict. c. 104, s. 2. . . . "qualified pilot shall mean any person duly licensed by any pilotage authority to conduct ships to which he does not belong."

(6) See regulation No. 4 of the Order in Council set out in the judgment.

1892

THE CARL XV.

April 1. THE PRESIDENT (SIR CHARLES BUTT) [after stating the nature of the case, and referring to the contention of the plaintiffs that the pilot was not duly qualified, and that the defendants were not bound to employ him, and reading s. 388 of the Merchant Shipping Act, 1854 (already set out), proceeded:] It was contended on the part of the defendants that, having regard to that section alone, as explained by the interpretation clause, s. 2 of the Act, which says that the words "qualified pilot" shall "mean any person duly licensed by any pilotage authority to conduct ships to which he does not belong," the pilot in question was a duly qualified pilot.

Without entering upon that discussion, with reference to which much may be said on each side, I think, having regard to those sections of the Act and to the Order in Council of May 1, 1855, the pilot of the *Carl XV.* was a "qualified pilot acting in charge of such ship" within the meaning of the 388th section of the Merchant Shipping Act, 1854, it being admitted that when the pilot went on board the *Carl XV.* there was no pilot to be obtained licensed to conduct ships drawing more than fourteen feet of water.

Par. 4 of the Order in Council provides that, "No person licensed as a pilot for the London district (except freemen of the said Watermen's Company, to be licensed as hereinafter provided) shall take charge as such of any ship drawing more than fourteen feet water, in the river Thames or Medway, or any of the channels leading thereto or therefrom, until such person shall have acted as a licensed pilot for three years, and shall have been after such three years, on re-examination, approved of in that behalf by the said Trinity House, on pain of forfeiting 10*l.* for every such offence, unless there shall be no qualified pilot to be obtained who has passed the said examination for ships drawing more than fourteen feet water."

I am of opinion that the Order in Council not only exempts him from the penalty, but, taken in conjunction with the other enactments referred to, qualifies him pro hac vice to conduct ships of a greater draught than fourteen feet.

My judgment must, therefore, be for the defendants.

1892

THE CARL XV.

On the question of costs:—

Barnes, Q.C., for the plaintiffs, submitted that as the defendants had failed on the merits, their counter-claim should be dismissed with costs: *The Ruby.* (1)

Stubbs, for the defendants, contended that *The Ruby* (1) had not been followed in practice.

THE PRESIDENT reserved the point for inquiry in the registry as to the practice.

April 2. THE PRESIDENT. Each party will bear their own costs of the action, but the defendants must pay any costs occasioned by the counter-claim.

Solicitors for the plaintiffs, the owners of the *Angelus*: *Thomas Cooper & Co.*

Solicitors for the defendants, the owners of the *Carl XV.*: *Pritchard & Sons.*

T. L. M.

[IN THE COURT OF APPEAL.]

C. A.

1892

Jan. 27.

PARNELL (FORMERLY O'SHEA) *v.* WOOD AND ANOTHER.

Probate—Discovery—Inspection of Banker's Books—Affidavit of Documents—Sealing up Entries—Subpœna duces tecum to produce Banker's Books—Bankers' Books Evidence Act, 1879 (42 & 43 *Vict. c.* 11), *s.* 7.

By the Bankers' Books Evidence Act (42 & 43 Vict. c. 11), s. 3, subject to the provisions of this Act, a copy of any entry in a banker's book shall be received as primâ facie evidence of such entry. By s. 7, on the application of any party to a legal proceeding a Court or a judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings.

The plaintiff in an action for probate having been ordered to produce for inspection documents in her possession relating to the matters in question in the action, produced the pass books of her banking account, sealing up parts of them which were, as she deposed, irrelevant to the matters in issue. Application was thereupon made by the opposite parties for an order authorizing them to inspect the books, or in the alternative for leave to issue a subpœna duces tecum to the officers of the bank for their production:—

Held, that the application could not be granted, for there was nothing in the

(1) 15 P. D. 139.

C. A.
1892
PARNELL
v.
WOOD.

Act to deprive a party to a legal proceeding of his right to refuse discovery of entries in his banker's books on the ground that they were irrelevant, and that whether the subpœna duces tecum should be granted was a matter which ought to be left for the determination of the judge at the trial.

THIS was an ex parte appeal in an action for probate by the interveners, Anne and Irene Courage, from a decision of Collins, J., as vacation judge, refusing to order the plaintiff's bankers to allow the applicants to inspect the entries in their books concerning the plaintiff's banking account. The interveners asked in the alternative for leave to issue a subpœna duces tecum directing the bankers to produce their books at the trial.

The action was to obtain probate of a will of Mrs. Wood, made in favour of the plaintiff. The defendants alleged that the will had been obtained by the plaintiff by undue influence. The plaintiff having filed an affidavit as to documents, the defendants applied for a further and better affidavit, which the registrar refused to order, and on January 20, 1891, Butt, J., affirmed his decision. The defendants then applied for liberty to inspect the banker's books containing the plaintiff's banking account, and on January 27, 1891, Butt, J., made an order giving them such liberty. The plaintiff appealed from this order, and the defendants appealed from the order of January 20, 1891. On February 25, 1891, the Court of Appeal ordered the plaintiff to file a further affidavit as to pass books, with liberty to seal up such portions of the account disclosed as were not material to the matters in question in the action. The appeal from the order of January 27, 1891, was adjourned, but the Court appeared disposed to think the order wrong. The plaintiff made the affidavit directed, and produced her pass books, sealing up certain parts of them. The parts which were left open included divers sums of money received by the plaintiff by means of cheques from Mrs. Wood, which were paid into the account of the plaintiff, but all entries shewing the application of those sums were covered up.

The interveners, Anne and Irene Courage, who were in the same interest as the defendants, then took out a summons for liberty to inspect the banker's books containing the plaintiff's account under the Bankers' Books Evidence Act, 1879 (42 & 43 Vict. c. 11), s. 7.

Collins, J. refused the application. The interveners renewed the application before the Court of Appeal, asking in the alternative for leave to issue a subpœna duces tecum for the production of the banker's books at the trial.

Tindal Atkinson, for the application, referred to the Bankers' Books Evidence Act, 1879 (42 & 43 Vict c. 11), ss. 6, 7; *Howard* v. *Beall* (1); *Arnott* v. *Hayes*. (2)

LINDLEY, L.J. In this case the interveners apply for an order authorizing them to inspect the books containing the plaintiff's banking account, or in the alternative for leave to issue a subpœna duces tecum for their production. The plaintiff was ordered to make an affidavit as to documents and produce them. She complied. She set out her pass books and produced them, sealing up parts of them which she swore to be irrelevant to the matters in issue. Her opponents, therefore, have got production of the pass books to the extent to which, as between them and her, they are entitled to see them before the trial. This application in effect seeks to deprive the plaintiff of the right to seal up until the trial such part of the books as she swears to be irrelevant. I do not say that the Bankers' Books Evidence Act might not be resorted to before the trial in some cases—as, for instance, if the pass books had been lost. But the sole object of this application is to get behind the privilege, and such an object is not within the scope of the Act. The Act was passed mainly for the relief of bankers, to avoid the serious inconvenience occasioned to them by their having to produce books which were in constant use in their business, and by having to send, for the purpose of verifying them, a clerk who would otherwise be employed at the time in making entries in those very books.

As to the subpœna duces tecum, it probably will never be wanted. If the pass books are produced at the trial no production of the banker's books can be needed, and the trial is the proper time for determining whether a subpœna duces tecum should be granted. The application will be refused, without prejudice to any application to the judge at the trial.

(1) 23 Q. B. D. 1. (2) 36 Ch. D. 731.

C. A. 1892

PARNELL v. WOOD.

LOPES, L.J. The object of this application is to obtain inspection of the parts of the pass books which the plaintiff has sealed up. The Bankers' Books Evidence Act has no relation to this case, which must be decided according to the rules as to discovery. The plaintiff has made an affidavit as to documents in which she has scheduled her pass books, and has produced them, sealing up parts of them, and pledging her oath that the parts sealed up are not relevant to the matters in issue. She is entitled to do so. The appellants seek inspection of the materials from which the pass books are made up, in order in fact to obtain inspection of the parts which are sealed up and sworn to be immaterial. If we granted this application we should destroy all the rules as to privilege.

As to the subpœna duces tecum, I do not see the advantage of granting it. I do not see how the banker's books would be of any use at the trial. It may be that at the trial some special case for production of the books may be made out under s. 6 of the Act, but that ought to be considered at the time of the trial and not now.

KAY, L.J. I am of the same opinion. It is necessary to proceed with caution in acting on s. 7 of the Bankers' Books Evidence Act, as was observed by Bowen, L.J., in *Arnott* v. *Hayes*. (1) According to the appellants, if a person engaged in litigation has a banking account, his adversary is entitled to inspect that account to see whether he can find anything that will help him. The Bankers' Books Evidence Act has nothing to do with any question of the kind. Sect. 7 of the Act gives a certain power of inspecting bankers' books if the judge thinks fit to order it, but to suppose that it meant to authorize a roving inspection of them is absurd. The main object of the Act was this: before the Act the only way of making bankers' books evidence was to have them produced at the trial, and to examine the clerk who kept them. Bowen, L.J., in *Arnott* v. *Hayes* (2), has pointed out the course of proceeding. The books which were wanted were generally books which were in daily use, and the statute was mainly passed for the purpose of relieving

(1) 36 Ch. D. 731. (2) 36 Ch. D. 731, 738.

bankers from this inconvenience by allowing them to make copies and verify them. The Act does indeed provide by s. 7 for allowing inspection where a judge thinks proper to order it, but a case must be made shewing that such inspection is proper. I never saw a more extraordinary application than the present. Pass books are produced which are no doubt copied from the banker's books, but the party producing them seals up parts which she swears not to be relevant. According to the law of discovery, the opposite party has no right to look at the parts so sealed up. The present application is an attempt to get behind the affidavit of the party producing the documents. There is nothing to shew that the affidavit is untrue, but the applicants wish to evade it by obtaining inspection of the books from which the pass books were made out.

As regards the subpœna duces tecum, I agree with what has been said by Lopes, L.J. The pass books having been approved by the customer, are evidence against her as admissions, and therefore at the trial it is a matter of course that she should be subpœnaed to produce them. The sealing up is only to prevent inspection before the trial. At the trial the judge will open the sealed parts, and whatever is material can be read. The judge will take care to protect the customer from disclosure of what is immaterial, and will not allow inspection of entries which relate only to the customer's private affairs and have no bearing on the matter in dispute, but the disclosure of which might do great injury to the customer.

Appeal dismissed.

Solicitors: *Druces & Attlee.*

H. C. J.

1892
March 8.

IN THE GOODS OF E. D. ALSTON.
IN THE GOODS OF G. C. ALSTON.

Probate—Identical Wills of Husband and Wife—Death—Presumption as to Survivorship—Intestacy—Grant of Administration with Will annexed to Next of Kin of each.

A husband and wife executed identical wills, each appointing the other universal legatee and sole executor, and substituting executors in case of the other dying first.

They started together upon a voyage in the same ship, which was supposed to have been lost at sea with all on board. There was no evidence that either of them survived the other:—

Held, that a grant of administration with the will annexed of the estate of each, as in case of an intestacy, might be made to one of the next of kin of each.

APPLICATION for administration.

Captain Edward Daniel Alston, late of Great Bromley Hall, Colchester, in the county of Essex, and Grace Charlotte Alston, his wife, sailed together on July 29, 1890, from Liverpool in the sailing ship *Roman Empire*, bound for Peru. On July 30, Captain Alston wrote to his owners and Mrs. Alston wrote to her sister-in-law by the pilot who left the ship on that day; and on September 6, 1890, the *Roman Empire* was spoken with by the ship *Hermione*.

Nothing more had been heard of her, and the underwriters had paid as upon a total loss.

On March 15, 1886, Captain Alston made a will, by which he gave all his real and personal estate absolutely to his wife, and he appointed her his sole executrix. The will also provided that in case of his wife predeceasing him, his brother-in-law, John E. Alston, and A. W. Browne should act as his executors and trustees, and that his estate should be divided among his sisters; and by a codicil he substituted G. B. Ingram for J. E. Alston as his executor. On the same date, Mrs. Alston, who had separate property, made an identical will, appointing her husband her universal legatee and sole executor, and nominating executors and legatees in the event of her husband predeceasing her, and substituting one executor for another.

1892

IN THE GOODS OF ALSTON.

Searle, moved for a grant of administration with the will annexed of the estate of Captain Alston, to be granted to Mary Eliza Alston, his lawful sister and one of his next of kin. As there is no evidence that either husband or wife survived the other, the result is that there is an intestacy: *Wing* v. *Angrave*. (1)

THE PRESIDENT. The best way out of the difficulty, I think, is to make a grant of administration with the will annexed, with leave to swear the death as having occurred on or after September 6, 1890.

A similar motion was made in regard to the estate of Mrs. Alston, and a similar grant made to Fanny Elizabeth Francis her sister and one of her next of kin.

Solicitors for Captain Alston's estate: *Honey & Mellersh.*

Solicitor for Mrs. Alston's estate: *James White.*

W. L.

IN THE GOODS OF A. G. RICH.

1892

March 22.

Probate—Will shewing Insanity—Grant of Administration as in case of an Intestacy—Form of Oath by Administrator.

A testator while of unsound mind made a will disposing of large sums of money, although at the time of making the will he was possessed of no property whatever and was dependent upon his relatives for support:—

Held, that administration might be granted as in case of an intestacy to the sister of the deceased as attorney for his widow, who was resident in Australia, and that the oath of the administratrix should be to the effect that the deceased, so far as she knew and believed, had left no will.

APPLICATION for administration.

Alfred G. Rich died on February 19, 1891, at the Lunatic Asylum, Bristol, of which he had been an inmate since November, 1879, having been insane since the year 1867. He was under the delusion that he was possessed of considerable personal estate, whereas in fact he had been wholly dependent upon his mother and sister for support. After his death, a will duly executed by him and bearing date June 20, 1872, was found by his sister, by which he disposed of large sums of money. At the date of the

(1) 8 H. L. C. 183.

1892

IN THE GOODS OF RICH.

will he was possessed of no property whatever; but, by the death of his mother in 1885, he became entitled to two sums of 1183*l.* in the New Consols and 144*l.* 18*s.* 9*d.* in 3½ per cent. India Stock, the income of which was paid to his sister for his maintenance. He left a widow and three children who were resident in Australia.

Searle, moved for a grant of administration to Georgiana Rich, the sister of the deceased, as attorney for Margaret Rich, his lawful widow and relict, as in case of an intestacy.

[THE PRESIDENT. How can I grant administration without the will annexed when there is a will in existence, unless I first pronounce against the will?]

The will is wholly inoperative, and there have been cases in which administration has been granted and the will deposited in the registry without any order pronouncing it invalid. [He cited Coote's Practice, p. 95, 8th ed.; *In the Goods of Bourget* (1); *Perry* v. *Dyke*. (2)]

[THE PRESIDENT. There is a difficulty as to the form of oath to be taken by the administratrix.]

D. C. Bartley, for the other next of kin.

Cur. adv. vult.

THE PRESIDENT. You may have a grant of administration without the will annexed, and, as to the form of oath, the administratrix must swear that the deceased made no will as far as she knows and believes.

Solicitors for applicant: *Blake & Heseltine.*

Solicitors for next of kin: *Burchell & Co.*

(1) 1 Curt. 591. (2) 1 Sw. & Tr. 12.

W. L.

IN THE GOODS OF GEORGE MOORE. 1892 April 5.

Probate—Administration—Lunatic Widow—Next of Kin unable to find Justifying Security—Grant to Receiver appointed by Chancery Division.

Upon an application for administration it appeared that the widow of the intestate was a lunatic, and his only other next of kin, his brother, was unable to furnish justifying security. A suit had been instituted in the Chancery Division for the administration of the estate and a receiver appointed; but a portion of the estate, consisting of stock in a waterworks company, could not be realized except by a personal representative of the deceased:—

Held, that administration could not be granted to the brother of the deceased without requiring justifying security, but that a grant might be made to the receiver, to issue when the registrar had been satisfied that the Chancery Division had continued his appointment.

APPLICATION for administration.

George Moore, late of De Keyser's Hotel, Blackfriars, in the City of London, died intestate on December 18, 1891, without child or parent, leaving Sarah Moore, his lawful widow, and William Moore, of 35, Constance Road, Champion Hill, East Dulwich, his natural and lawful brother, his only next of kin, and several nephews and nieces entitled in distribution. Mrs. Sarah Moore, the widow, had been for many years a lunatic so found by inquisition. George Moore, the deceased, died possessed of property of the value of about 33,600*l.*, of which the main items were 13,200*l.* Egyptian State Domain Mortgage Bonds and 10,000*l.* East London Waterworks Company Stock. As justifying security could not be given by William Moore, the brother, a suit was commenced in the Chancery Division for the administration of the estate, and, by order of the Court, Mr. P. H. Sainsbury, of 61, Fore Street, in the City of London, was appointed receiver to get in the personal estate of the intestate until a legal personal representative should be appointed.

The Egyptian State Domain Mortgage Bonds had been sold by the receiver; but the certificates of the East London Waterworks Company Stock could only be transferred to a purchaser when a legal personal representative had been appointed.

On March 8, 1892, application was made to this Court on

1892

IN THE GOODS OF MOORE.

behalf of William Moore for a grant of administration without requiring justifying security; but the Court refused to dispense with justifying security, and on March 25 William Moore executed an instrument renouncing his right to letters of administration. On March 24, by an order made in chambers by Kekewich, J., Mr. Sainsbury, the receiver, who was also a person entitled in distribution, was granted leave to apply to this Court for letters of administration.

Bayford, Q.C. (*A. Beddall*, with him), moved that letters of administration of the estate of George Moore be granted to Mr. Sainsbury, the receiver, passing over the widow, and that the amount of security be reduced to a nominal sum. *In the Goods of Williams* (1) is an authority for passing over the widow; and in *In the Goods of Mayer* (2) the Court made a grant to the receiver appointed, as in this case, by the Court of Chancery, with authority to collect the estate and to apply to the Court of Probate for administration. There is this difference, that here the applicant has not cited all the persons entitled in distribution because the estate has to be administered in the Chancery Division.

[JEUNE, J. Is it clear that the 10,000*l.* of Waterworks Company Stock would come under the authority of the Chancery Division?]

The receiver would undertake to apply to the Chancery Division to continue his appointment as receiver.

JEUNE, J. I will make a general grant of administration to the receiver; but it will lie in the registry until the registrar is satisfied that the appointment of receiver has been continued.

Solicitors: *Batchelor & Cousins.*

(1) 3 Hagg. Ecc. 217. (2) Law Rep. 3 P. & D. 39.

W. L.

HIPWELL *v.* HIPWELL. 1892 March 29.

Divorce—Wife's Petition—Costs—Variation of Settlements—Sum paid out of Settled Fund to pay the balance of Costs due—22 & 23 Vict. c. 61, s. 5.

In a petition by the wife a decree was pronounced dissolving the marriage, and condemning the respondent in costs. The respondent could not be found after the making of the decree, and there was no prospect of recovering the costs from him. Upon an application for variation of the marriage settlement, it appeared that the husband had brought nothing into the settlement:—

Held, that part of the funds included in the settlement might be applied to satisfy the balance still remaining unpaid of the costs of the suit and of the petition for the variation of settlements.

APPLICATION to confirm the registrar's report on variation of settlements.

In this case a decree had been pronounced dissolving the marriage on the ground of the husband's adultery and cruelty. The custody of the two children of the marriage had been given to the petitioner, and the respondent had been condemned in the costs of the suit.

By an ante-nuptial settlement dated April 7, 1874, the petitioner brought into settlement a sum of about 3000*l.*, producing an income of 105*l.* a year, which was settled on the usual trusts, the first life interest to the wife, a reversionary interest to the husband, with a joint power of appointment among the children of the marriage, and a joint power of appointing new trustees. The respondent brought no funds into settlement. The costs of the suit and of the petition for variation of settlements amounted to 139*l.* 16*s.* 9*d.*, and, the respondent having disappeared, there was no prospect of obtaining the costs from him. The petitioner's relatives had advanced to her a sum of 90*l.*, leaving a balance of 49*l.* 16*l.* 9*d.* of unpaid costs.

The registrar, in his report on the petition for variation of settlements, after recommending that the respondent's interest in the settlement and in the joint power of appointment should be extinguished, went on to say: "The petitioner asks that the sum of 49*l.* 16*s.* 9*d.*, her costs in connection with the suit and the petition for the variation of settlements, should be paid out of the settled fund. That, to a slight extent, adversely affects the interests of the children; but it is, I think, on the whole to the

1892

HIPWELL v. HIPWELL.

substantial interest of the children, as well as of the petitioner, that she should not start under a debt; and I think, under the circumstances, the order might be made that the trustees pay out of the corpus of the settled fund the balance of the costs of the petitioner now due, subject to taxation, and also her costs in connection with the petition for the variation of settlements."

The trustees who had been cited did not appear.

Bayford, Q.C., moved to confirm the registrar's report, and for an order on the trustees to pay over the sum of 49*l.* 16*s.* 9*d.*, the balance of the costs due to the petitioner's solicitor.

[He referred to *Ponsonby* v. *Ponsonby* (1), and 22 & 23 Vict. c. 61, s. 5.]

THE PRESIDENT made the order as prayed, subject to the filing of an affidavit that the trustees did not oppose.

Solicitor: *J. G. Layard.*

W. L.

1892

Feb. 23.

BLANDFORD *v.* BLANDFORD.

Divorce—Variation of Settlements—Maintenance of Children—20 & 21 *Vict.* c. 85, s. 35—22 & 23 *Vict.* c. 61, s. 4.

The Court has no power to make provision for the maintenance of children above the age of sixteen years.

MOTION to dismiss a supplementary petition for maintenance of a child of a marriage which had been dissolved.

In this case a decree absolute had been pronounced in 1883, dissolving the marriage on the petition of the wife, and an order for a variation of settlements had been made by which provision was made for the maintenance of the Marchioness of Blandford and two daughters of the marriage.

There was an only son of the marriage, the Marquis of Blandford, to whom the respondent, now Duke of Marlborough, made an allowance of £400 a year; but in April, 1890, he ceased to pay it; and in June, 1890, Jeune, J., gave leave to the petitioner to file a petition for further variation of settlements and for a provision for the Marquis of Blandford, who at that time had

(1) 9 P. D. 58, 122.

attained the age of nineteen years. The petition was heard before the registrar; and, on the Duke of Marlborough declining to give any particulars of his income, leave was given to the petitioner to present a supplementary petition. This petition was filed, and served personally on the respondent on December 10, 1891, and a summons was taken out in chambers by the respondent for the dismissal of the petition on the ground that the Court had no jurisdiction to make such an order. The motion was adjourned into Court.

Sir R. Webster, A.G. (*Lyttelton*, with him), for the respondent, moved to discharge the supplemental petition. As the matter now stands, the question which the Court has to decide is simply a legal one. Can this Court order a father to maintain his son, that son being above the age of sixteen years. At Common Law there is no such obligation, and the two sections by which this Court is empowered to make orders for the "custody, maintenance, and education" of the children of the marriage, viz., 20 & 21 Vict. c. 85, s. 35, and 22 & 23 Vict. c. 61, s. 4, were not intended to impose a greater burden and responsibility on the father than are imposed on him by the Common Law. In *Ryder* v. *Ryder* (1), the Court held that it had no power to make an order for the custody of children over sixteen; and in *Webster* v. *Webster* (2), it held that maintenance followed custody, and declined to make any order in the case of an eldest child who was above sixteen years of age. In *Mallinson* v. *Mallinson* (3), Lord Penzance, following the decision in *Reg.* v. *Howes* (4), held that the age of sixteen years was the limit within which the Court would interfere to control the freedom of a minor. The claim is virtually that the Duke of Marlborough shall make a provision for life for his son; but there is no authority to shew that such a provision has ever been made against the will of the father.

Inderwick, Q.C. (*Searle*, with him), for the petitioner. There are two points to be discussed. In the first place, the raising of this question of jurisdiction is a distinct breach of the agreement

(1) 30 L. J. (P. & M.) 44.
(2) 31 L. J. (P. & M.) 184.
(3) Law Rep. 1 P. & D. 221.
(4) 30 L. J. (M.C.) 47.

1892

BLANDFORD v. BLANDFORD.

made in this Court by the parties that a provision should be made for the Marquis of Blandford.

[THE PRESIDENT. That may or may not be so; but no amount of bad faith, or even fraud, could give me jurisdiction if I did not possess it.]

No doubt it has been the practice in this Court not to make orders for custody above the age of sixteen years; but maintenance stands on a different footing. The power which the Court has is a statutory power, to be exercised under extraordinary circumstances where the marriage tie has been broken, and the Court is directed to make such orders in reference to the children of the marriage as may seem just and proper. There is no limit in the Act as to maintenance; and though the Court may have refused to make orders as to custody in regard to children over sixteen years of age, that is because custody is an interference with personal liberty which the Court would be unwilling to sanction beyond limits actually necessary. The distinction was drawn by the Court in *Ryder* v. *Ryder* (1), where Willes, J., said it must not be inferred that the Court had not the power to make orders for the maintenance of children over sixteen. The Court has made orders for maintenance without limit of age in *Bent* v. *Bent* (2). [He cited also *Hunt* v. *Hunt* (3); *Benyon* v. *Benyon* (4); and *March* v. *March and Palumbo.* (5)]

[THE PRESIDENT. All these are cases in which the Court has been disposing of the property of a guilty wife.]

There is no difference in the application of the moneys of husband, wife, or co-respondent; and in cases of restitution of conjugal rights there appears to be unlimited power of providing for the children of the marriage. There has been no actual decision upon these words "just and proper" in the 35th section of the Act of 1857; but it is evidently for the public interest that where the marriage tie is dissolved the children of the marriage—equally with the wife—should not be injured thereby.

(1) 30 L. J. (P. & M.) 44.
(2) 2 Sw. & Tr. 392.
(3) 8 P. D. 161.
(4) 1 P. D. 447.
(5) Law Rep. 1 P. & D. 440.

1892

BLANDFORD v. BLANDFORD.

THE PRESIDENT. It is clear that apart from statutory authority this Court would have no authority to interfere in this matter. There is no question here of varying settlements, nor of ordering a guilty husband to secure a maintenance for his wife; and the only sections under which the Court is entitled to make an order to the effect asked for are the 35th section of 20 & 21 Vict. c. 85, and s. 4 of 22 & 23 Vict. c. 61. It is perfectly clear, on principle and authority, that if I were dealing with the first of the matters mentioned in the sections—that is, with custody—I should have no power to make an order as to the custody of a child who had attained the age of sixteen years. When we come to the next matter—education—the sections can only be intended to apply to the education of young persons, and certainly are not intended to apply to the education of a child as long as he or she may live. Am I to put a different interpretation on the sections in regard to maintenance? My own opinion is that the sections dealing with the custody, maintenance, and education of children apply only to infants, and deal with all these matters exactly in the same way. It is clear therefore, I think, on the authorities, that there is no jurisdiction in the Court to make such an order as that asked for; and my order will be that this supplemental petition be dismissed.

Solicitors for the petitioner: *Arnold & Henry White.*
Solicitor for the respondent: *Spencer Whitehead.*

W. L.

C. A.

1892

March 12, 16.

[IN THE COURT OF APPEAL.]

RUSSELL *v.* RUSSELL.

Divorce—Wife's Costs—Security—Husband's Bond to Wife's Solicitor—Enforcing Bond—Discretion of Court as to Costs—Appeal—Divorce Court Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 51—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 49—*Appellate Jurisdiction Act*, 1876 (39 & 40 *Vict. c.* 59), *s.* 20—*Divorce Court Rules*, 158, 159, 199, 201.

In a petition by the wife for judicial separation, her solicitor has no greater right than his client to recover costs from the opposite party. Where, therefore, a petition by the wife for judicial separation had been dismissed with costs:—

Held, that the solicitor of the petitioner could not enforce against the respondent the bond executed by the respondent, under rule 158 of the Divorce Court Rules, as security for the petitioner's costs of the trial.

Under s. 51 of the Divorce Act, 1857, the costs of any suit or proceeding under the Act are in the discretion of the Court.

Where, therefore, the Court has, in the exercise of its discretion, refused an application under rule 199 of the Divorce Court Rules to allow the bond given by the husband to the wife's solicitor under rule 158 to be enforced, the Court of Appeal is precluded by s. 49 of the Judicature Act, 1873, and s. 20 of the Appellate Jurisdiction Act, 1876, from reviewing such decision.

APPEAL from an order of the President of the Probate and Divorce Division in a petition for judicial separation.

The petition had been presented by the Countess Russell against her husband, Earl Russell, praying a decree for judicial separation.

The trial took place in December, 1891, with the result that on December 4, Sir C. Butt, President, dismissed the action with costs, to be paid by the petitioner. No order was made or applied for at the trial, under rule 159 of the Divorce Court Rules and Regulations of December 26, 1865, allowing any part of the petitioner's costs as against the respondent her husband. (1) The wife's solicitors had obtained payment by the

(1) By s. 51 of the Divorce Act, 1857 (20 & 21 Vict. c. 85), "The Court, on the hearing of any suit, proceeding, or petition under this Act, and the House of Lords on the hearing of any appeal under this Act, may make such order as to costs as to such Court or House respectively may seem just: provided always, that there shall be no appeal on the subject of costs only."

By s. 49 of the Judicature Act, 1873, "No order made by the High Court of Justice or any judge thereof, by the

husband of her costs of the action prior to the trial. The costs and expenses of the wife of and incidental to the trial itself having been estimated at 350*l.*, an order was made on July 3, 1891, by Sir C. Butt, President, under rule 158, directing the

---

consent of parties, or as to costs only, which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or judge making such order."

By s. 20 of the Appellate Jurisdiction Act, 1876, "Where by Act of Parliament it is provided that the decision of any Court or judge, the jurisdiction of which Court or judge is transferred to the High Court of Justice, is to be final, an appeal shall not lie in any such case from the decision of the High Court of Justice, or of any judge thereof, to Her Majesty's Court of Appeal."

Rule 158 of the Rules and Regulations (Dec. 26, 1865) in Divorce and Matrimonial Causes, provides that, "After directions given as to the mode of hearing or trial of a cause, or in an earlier stage of a cause by order of the judge ordinary, or of the registrars, to be obtained on summons, a wife who is petitioner . . . . may file her bill or bills of costs for taxation as against her husband, and the registrar to whom such bills of costs are referred for taxation shall, when directions as to the mode of hearing or trial have been given, ascertain what is a sufficient sum of money to be paid into the registry, or what is a sufficient security to be given by the husband to cover the costs of the wife of and incidental to the hearing of the cause; and shall thereupon issue an order upon the husband to pay or secure the said sum within a time to be fixed by the registrar; provided that in case the husband should, by reason of his wife having separate property or for other reasons, dispute her right to recover any costs pending suit against him, the registrar may suspend the order to pay the wife's taxed costs, or to pay or secure the sum ascertained to be sufficient to cover her costs of and incidental to the hearing of the cause, for such length of time as shall seem to him necessary to enable the husband to obtain the decision of the Court as to his liability."

Rule 159 is as follows: "When on the hearing or trial of a cause the decision of the judge ordinary or the verdict of the jury is against the wife, no costs of the wife of or incidental to such hearing or trial shall be allowed as against the husband, except such as shall be applied for, and ordered to be allowed by the judge ordinary, at the time of such hearing or trial."

Rule 199 provides that, "The bond taken to secure the costs of a wife of and incidental to the hearing of a cause shall be filed in the registry of the Court of Probate, and shall not be delivered out or be sued upon without the order of the Court."

Rule 201 (so far as is material) provides as follows: "A wife who is unsuccessful in a cause, and who at the hearing of the cause has, in pursuance of rule 159, obtained an order of the judge ordinary that her costs of and incidental to the hearing or trial of the cause shall be allowed against her husband to the extent of the sum paid or secured by him to cover such costs, may nevertheless proceed at once to obtain payment of such costs after allowance thereof on taxation."

C. A. 1892

RUSSELL v. RUSSELL.

respondent either to pay that sum into the Divorce Registry, or give a bond "conditioned for payment of such expenses of the said petitioner as shall be certified to be due and payable by the said respondent not exceeding the said sum of 350*l.*"

In pursuance of that order the husband gave to the wife's solicitors (not to the wife) a bond conditioned for payment by him to them of the 350*l.*, "or the lawful costs" of the wife "of and incidental to the hearing and trial of the cause to the extent of 350*l.*" This bond was duly filed in the Divorce Registry in accordance with rule 199.

On January 12, 1892, a summons was taken out by the husband to have his bond cancelled; but, upon the summons coming before the President in chambers, the learned judge refused for the present to cancel the bond, though he directed that it should not be put in suit unless it could be proved that the wife could not pay the costs she had been ordered to pay at the trial. On the faith of that bond the wife's solicitors had expended, in relation to the trial, about 550*l.* out of pocket, exclusive of their costs for professional services; and accordingly the wife applied to the President by summons, that her costs of the trial up to and including the 350*l.* for which the bond had been given should be taxed and paid by her husband to her solicitors; but on February 19, 1892, the learned judge made an order dismissing the application with costs, at the same time expressing his opinion that the wife could and ought to pay her solicitors' costs herself, and that she was not entitled to require her husband to pay any of such costs. The petitioner appealed to the Court of Appeal.

It appeared that the husband's income was between 4000*l.* and 5000*l.* a year, and that the wife's income, which was settled to her separate use without power of anticipation, was between 500*l.* and 600*l.* a year; but it was said that she had no separate estate out of which her solicitors could enforce payment of their costs.

Lewis Coward, (*Sir Edward Clarke, Q.C., S.G.*, with him), for the appellant, the Countess Russell. The wife's solicitors are entitled to enforce this bond. The object of the rules requiring

the husband to give security for the wife's costs of the trial is to protect her solicitor; and, provided the solicitor conducts the litigation properly, he ought not to lose his costs merely because the wife is unsuccessful, for it is not his fault if she is wrong: *Flower* v. *Flower* (1); *Robertson* v. *Robertson* (2); *Smith* v. *Smith*. (3) Unless this bond can be enforced the wife's solicitors will lose their costs altogether, for the wife has no separate estate out of which payment can be enforced.

Sir Charles Russell, Q.C., and *Bargrave Deane*, for the respondent. The Court is asked to make an order as to costs inconsistent with that made by the President at the trial in the exercise of his discretion, and to say that the petitioner is entitled to her costs. This application is really made by the solicitors of the petitioner, and it is the first time that it has been suggested that a solicitor may be entitled to recover his costs from the opposite party, though his client has been held not to be entitled to costs. The bond does not give the wife or her solicitor an absolute right to her costs of the trial; it is merely intended to secure the costs if the husband should be unsuccessful. This is an appeal as to costs, and therefore contrary to the Divorce Act, 1857, s. 51, the Judicature Act, 1873, s. 49, and the Appellate Jurisdiction Act, 1876, s. 20.

Coward, in reply. The rule is that, whether the wife is successful or not, the husband is bound to furnish her with the means of carrying on the litigation; it is a matter entirely independent of the result: *Hurley* v. *Hurley*. (4) The order of December 4 does not defeat or prejudice the previous order of July 3. The appeal is not on the question of costs; the respondent asks that he shall not be deprived of that which, six months before the trial, was given to him.

Cur. adv. vult.

1892. March 16. LINDLEY, L.J. (after referring to the provisions of the above sections and rules), said:—On the dismissal of a wife's petition her solicitor usually gets his costs to the amount of the money paid into Court by the husband, or to the amount of the bond given by him. But an order to this effect

(1) Law Rep. 3 P. & D. 132, 134.
(2) 6 P. D. 119, 121-2.
(3) 7 P. D. 84, 87-9.
(4) [1891] P. 367.

C. A. 1892

RUSSELL v. RUSSELL.

Lindley, L.J.

is necessary, and the solicitor cannot, without an order, get any costs, either out of the money in Court or by having recourse to the bond. Rule 159 requires that the application for the order should be made at the trial; but the judge may make the order afterwards. Still, he must make it; and he has a discretion in the matter, and, if he exercises his discretion, there is no appeal. That he has a discretion and can refuse to give the wife her costs is shewn by *Heal* v. *Heal* (1) and by *Butler* v. *Butler* (2), and when the last case was brought before the Court of Appeal (3), it was decided that no appeal lay. It is true that in *Robertson* v. *Robertson* (4) an appeal from an order as to costs was entertained. But the reason for this was that the Court of Appeal was of opinion that the judge of the Divorce Court had not exercised his discretion in the particular case, but had followed a rule of practice from which he did not feel himself at liberty to depart: see the judgment in that case, and Cotton, L.J.'s, observation upon it in *Butler* v. *Butler*. (5) In the present case the President did not decide against the wife in supposed obedience to any rule; he took the view that she could pay, and ought to pay, her own solicitor, and that she ought to have nothing from her husband. The President clearly exercised his discretion on the particular case; and that being so, this Court cannot review his decision. It was, however, contended very strongly that, as the wife had no separate estate except subject to a restraint on alienation, her solicitor could not compel her to pay him, and that under these circumstances the wife's solicitor was entitled to be paid his costs out of money paid into Court by the husband, or to enforce payment of his bond, unless the solicitor had personally by his own conduct disentitled himself from obtaining such costs. In support of this contention reference was made to *Flower* v. *Flower* (6) and *Smith* v. *Smith* (7), and other cases of the same kind, the most recent of which is *Hall* v. *Hall* (8), in this Court. But, although unquestionably the Court, when determining what it ought to do, considers the

(1) Law Rep. 1 P. & D. 300.
(2) 15 P. D. 32.
(3) 15 P. D. 126.
(4) 6 P. D. 119.
(5) 15 P. D. 126, 130.
(6) Law Rep. 3 P. & D. 132, 134.
(7) 7 P. D. 84.
(8) [1891] P. 302.

claims of the wife's solicitor and what is fair to him, and leans rather in his favour than against him, still the order which the Court will make is a matter of discretion. The wife's solicitor has no right to an order giving him costs as against the husband; her solicitor has no independent right of his own against the husband; the solicitor, in point of law, claims through the wife; and if the Court will not give her any costs against her husband, her solicitor can get none. This very point was raised and decided in *Butler* v. *Butler*. (1) Notwithstanding, therefore, the form of the bond (which is given to the solicitor and not to the wife), the principle established both at common law and in equity prevails in the Divorce Court, namely, that a solicitor has no greater rights than his client to costs from that client's opponent. The appeal, therefore, must be dismissed with costs, as is usual in this Court, whether the wife can be made to pay them or not.

KAY, L.J. (after stating the facts) continued:—Rule 199 provides expressly that a bond given by a husband to secure his wife's costs "shall not be delivered out or be sued upon without the order of the Court." It was one of the objects of the summons which has been dismissed to obtain such an order. If the President of the Divorce Court had a discretion to give or refuse the order, this appeal would seem to be precluded by s. 51 of the Divorce Act of 1857, and s. 49 of the Judicature Act, 1873, which, notwithstanding Order LXII., r. 1, of the Rules of the Supreme Court, 1875, has been held to apply to an appeal from this Division of the High Court: *Smith* v. *Smith* (2); *Butler* v. *Butler*. (3) One question is, whether the rules do give the judge such a discretion.

The practice seems to be that now, as before these rules, the wife may up to trial obtain from the husband payment of the costs in the meantime incurred. She did so in this case. For the estimated costs of the trial and incident thereto she can only obtain security. The husband may dispute her right even to this, on the ground "of his wife having separate property, or for

(1) 15 P. D. 32.
(2) W. N. (1882) 91.
(3) 15 P. D. 126.

C. A. 1892

RUSSELL v. RUSSELL.

Kay, L.J.

other reasons"; and, if he does, the registrar may suspend the order till the husband can "obtain the decision of the Court as to his liability." This, in the case of security for future costs, means liability to give such security. All this is provided by rule 158.

Rule 159 provides that, when on the hearing or trial the decision is against the wife, "no costs of the wife of and incidental to such hearing or trial shall be allowed as against the husband, except such as shall be applied for and ordered to be allowed by the judge ordinary at the time of such hearing or trial." No such order was applied for or made at the trial in this case. Assuming that the order might be made after the actual hearing, there must be an order of the judge before such costs can be allowed against the husband, and, if there must be such an order, it follows that the judge may make or refuse it in his discretion. This is confirmed by rule 199, which prevents the bond being put in suit "without the order of the Court," and by rule 201, which provides that a wife who is unsuccessful "and who at the hearing of the cause has, in pursuance of rule 159, obtained an order of the judge ordinary that her costs of and incidental to the hearing or trial of the cause shall be allowed against her husband to the extent of" the security, may proceed at once to obtain payment of them on taxation.

In *Heal* v. *Heal* (1) the Court refused to give the wife costs against the husband, although he had given security. In *Robertson* v. *Robertson* (2) the wife appealed against a judgment of divorce; the appeal failed on the main ground, but the judgment had allowed costs against the husband, limiting, however, the allowance to the amount of the husband's security. The Court held that it ought not to be so limited; and, even in that case of an appeal from the whole judgment, they justified their interference with that part of it relating to costs on the ground that the learned judge had not exercised any discretion at all, but simply made what had become, by an error in practice, the usual order. Cotton, L.J., said that rule 159 gives the judge a discretion; where steps were improperly taken on behalf of the wife, such as calling witnesses improperly, he might disallow

(1) Law Rep. 1 P. & D. 300. (2) 6 P. D. 119.

those costs, but it was not proper when he allowed her costs to limit them in every case to the amount of the estimate made for the purpose of security.

In *Smith* v. *Smith* (1) Sir James Hannen, commenting upon *Robertson* v. *Robertson* (2), gives the history of the origin of these rules in the former practice of the Ecclesiastical Court, and points out that the Court of Appeal in *Keats* v. *Keats* (3) stated it thus: "The foundation of the rule of the Ecclesiastical Court was that the wife should be enabled to bring her case to a hearing and defend herself, and so up to any time previous to the hearing the husband was generally liable to have the wife's costs taxed against him, and the Court has so far followed the rule, as in *Evans* v. *Evans and Robinson* (4); but, if the wife has brought her case to a hearing howsoever, and fails, the husband has never then been made liable to her costs." In *Smith* v. *Smith* (1) the President had allowed the wife's costs to the amount of the security. He points out that, if she claimed more, the time for making that claim was when that order was made, and that a subsequent application to increase the amount to be paid by the husband was too late.

Butler v. *Butler* (5) was an express decision by the Court of Appeal that, where the judge of the Divorce Court, in the exercise of his discretion, had refused on the wife's motion to order that her costs should be taxed and paid by the husband, s. 51 of the Divorce Act, 1857, and s. 49 of the Judicature Act, 1873, prevented an appeal. Two sums of 90*l.* and 50*l.* had been paid into Court in that case by the husband as security, and part of the motion was that these sums should be paid to her solicitors. That case decided both points argued before us—(1.) that the judge has a discretion to give or refuse costs against the husband, although he has given security; and (2.) that when that discretion has been exercised, s. 51 of the Divorce Act, 1857, and s. 49 of the Judicature Act, 1873, prevent an appeal for costs, at least, unless the judge gives leave to appeal.

Nothing that was said or done by this Court in the recent

(1) 7 P. D. 84.
(2) 6 P. D. 119.
(3) 1 Sw. & Tr. 358.
(4) 1 Sw. & Tr. 328.
(5) 15 P. D. 126.

C. A. 1892

RUSSELL v. RUSSELL.

Kay, L.J.

case of *Hall* v. *Hall* (1) is inconsistent with these decisions. That case came before the Court of Appeal with the leave and by the desire of Jeune, J., and the Court exercised the discretion which was vested in that learned judge in a case of some little complexity, refusing to order that the costs of the husband, of an appeal which the wife had been ordered to pay, should be paid out of a sum of 45*l.* deposited by him as security for her costs of the trial, and out of which her costs had been ordered to be paid.

In this case Earl Russell applied for delivery up of the bond. That application was refused for the present; in other words, it was adjourned sine die. The result is that no order has at present been made allowing against the husband any costs of the wife of or incidental to the hearing. Whether any such order should be made or not is a matter in the discretion of the judge, and from such discretion there is no appeal. It seems doubtful, looking at the Divorce Act, 1857, s. 51, whether leave to appeal can be given by the judge; s. 20 of the Appellate Jurisdiction Act, 1876, seems to repeat this enactment.

Appeal dismissed.

Solicitors: *Lewis & Lewis; Vandercom & Co.*

(1) [1891] P. 302.

G. I. F. C.

[IN THE CONSISTORY COURT OF LONDON.]

1891
Nov. 20.

THE VICAR AND ONE OF THE CHURCHWARDENS OF ST. BOTOLPH WITHOUT ALDGATE *v.* THE PARISHIONERS OF THE SAME.

THE VICAR AND THE CHURCHWARDENS OF ST. BOTOLPH WITHOUT ALDGATE *v.* THE PARISHIONERS OF THE SAME.

THE COMMISSIONERS OF SEWERS OF THE CITY OF LONDON AND THE VICAR AND PARISHIONERS OF ST. BOTOLPH WITHOUT ALDGATE *v.* THE PARISHIONERS OF THE SAME: HARRIS INTERVENING.

Ecclesiastical Law—Jurisdiction—Faculty—Churchyard closed for Burials—Appropriation of Portion for widening Public Thoroughfare—Removal of Human Remains to Consecrated Cemetery—The City of London Sewers Act, 1851 (14 & 15 *Vict. c. xci.*), *s.* 35.

The vicar and churchwardens of a parish church in the City of London applied to the Court to sanction an agreement between the vicar and the Commissioners of Sewers of the City of London to appropriate a portion of the parish churchyard closed for burials, for the widening of an adjoining street. At the hearing of the application it was proved that the proposed widening would be of great convenience to the congregation of the church, and to the public generally:—

Held, that the Court had jurisdiction to authorize by faculty the appropriation of the portion of the churchyard required for the proposed widening of the street, so long as it should be used for the purpose, and the removal to a vault to be constructed in the churchyard of all human remains disturbed in carrying out the works authorized by the faculty.

There being no room in the churchyard for the vault directed to be constructed as above mentioned, the Court ordered the remains disturbed to be placed in the crypts of the church. The Commissioners of Sewers and the vicar and churchwardens subsequently petitioned the Court to authorize the remains placed in the crypts under the order of the Court, as well as certain other remains found in one of the crypts to be removed to the City of London Cemetery, at Little Ilford in Essex, and it appeared that such removal was expedient on sanitary grounds:—

Held, that the Court had jurisdiction to authorize the remains to be removed as prayed, and to be re-interred in the consecrated portion of the Ilford Cemetery.

On June 13, 1890, a cause of faculty in which the vicar and one of the churchwardens of the parish church of St. Botolph without Aldgate in the city of London were the petitioners, and prayed that the Court would decree a faculty authorizing the sale to the Commissioners of Sewers of the City of London of

1891

VICAR AND ONE OF THE CHURCH-WARDENS OF ST. BOTOLPH WITHOUT ALDGATE *v.* PARISHIONERS OF SAME.

VICAR AND CHURCH-WARDENS OF ST BOTOLPH WITHOUT ALDGATE *v.* PARISHIONERS OF SAME.

COMMISSIONERS OF SEWERS OF CITY OF LONDON AND VICAR AND PARISHIONERS OF ST. BOTOLPH WITHOUT ALDGATE *v.* PARISHIONERS OF SAME.

portion of the churchyard of the said parish, amounting to about 261 square yards for the purpose of widening certain adjacent streets (1), and the carrying out of the following works: the setting back the walls, railings, and gates of the churchyard; the removal of any gravestones discovered in the ground proposed to be sold, and the removal and re-interment in the City of London Cemetery at Little Ilford, in Essex (2), of any human remains disturbed during the progress of the street improvement works, came on to be heard before the Chancellor of the Diocese of London (Dr. Tristram, Q.C.), sitting in St. Paul's Cathedral.

Atlay, appeared for the petitioners.

DR. TRISTRAM. The Court is asked to sanction by faculty an agreement between the incumbent of the church of St. Botolph without Aldgate and the Commissioners of Sewers of the City of London to appropriate a strip of the churchyard for the purpose of widening adjoining streets (3). It appears that the rectory of St. Botolph without Aldgate is vested in trustees, and that the incumbent of the parish, who is in law a perpetual curate and now termed a vicar, has been in the habit of receiving all fees derived from the churchyard. The above scheme originated with the Commissioners of Sewers in 1887. It was submitted to the vestry, and approved of by a resolution of that body passed at a vestry meeting held in July of that year. It was rescinded at a subsequent vestry by a resolution alleged to have been passed irregularly.

It appears from the evidence, that the principal objections taken to the scheme at the last vestry were two. First, that it might lead to the church tower being weakened, and secondly, that it would involve the disturbance of a large number of human remains. There is no evidence before me in support of the first of these objections. The second objection is one, which has

(1) Under the powers given by 57 Geo. 3, c. xxix., entitled "an Act for the better paving and regulating the streets of the metropolis."

(2) As to this cemetery, see 15 & 16 Vict. c. 85, s. 43, and 20 & 21 Vict. c. 35, ss. 1–8.

(3) As to the power of the commissioners to enter into such agreements "with the consent of the Bishop of London, to be signified by any instrument in writing under his hand and seal," see the London City Sewers Act, 1851, s. 32.

1891

VICAR AND ONE OF THE CHURCHWARDENS OF ST. BOTOLPH WITHOUT ALDGATE *v.* PARISHIONERS OF SAME.

VICAR AND CHURCHWARDENS OF ST. BOTOLPH WITHOUT ALDGATE *v.* PARISHIONERS OF SAME.

COMMISSIONERS OF SEWERS OF CITY OF LONDON AND VICAR AND PARISHIONERS OF ST. BOTOLPH WITHOUT ALDGATE *v.* PARISHIONERS OF SAME.

been repeatedly taken in previous cases, and repeatedly overruled, where sufficient grounds for interference have been made out. The Court is always prepared to consider any reasonable objection made by the parish vestry to alterations in a churchyard. But the objections in this case are not of sufficient weight to influence the Court. The Court is satisfied upon the evidence, that the proposed widening of this street will be a great boon to the persons attending the church, as well as to the public. The purchase money agreed to be paid by the Commissioners of Sewers is 3500*l.*, a fair price, and it is proposed, that this money should ultimately be applied to the purchase of a Vicarage House. This application of the purchase money is, in the opinion of the Court, proper and desirable. The Court decrees a faculty to issue, authorizing the setting back of the wall, railing, and gates of the churchyard; the throwing the portion of the churchyard outside the said wall and railing, when set back, into the adjoining street for public convenience, and the completion of the arrangement with the Commissioners of Sewers, by which they are to have the user for the sum named of the portion of the churchyard thrown into the street for so long as it may be required for the purpose. A proviso must be inserted in the faculty, directing human remains, which may be found in the portion of the churchyard to be appropriated for the street, to be reverently reinterred in a vault to be constructed for the purpose in some other portion of the churchyard, if it is practicable. If it should turn out that this is not practicable, a further application must be made to the Court.

On August 20, 1890, the faculty decreed issued, and on February 28, 1891, on the petition of the vicar and both the churchwardens of the parish, the Court being satisfied, that there was no room in the churchyard for the vault ordered to be constructed to contain the remains referred to in the proviso to the faculty, made an order that in lieu of the directions as to reinterment mentioned in that proviso all human remains removed from the portion of the churchyard appropriated to the widening of the adjoining street should be placed in parts of the crypts of the church, to be walled off from the rest of such crypts, and so

1891

VICAR AND ONE OF THE CHURCHWARDENS OF ST. BOTOLPH WITHOUT ALDGATE *v.* PARISHIONERS OF SAME.

VICAR AND CHURCHWARDENS OF ST. BOTOLPH WITHOUT ALDGATE *v.* PARISHIONERS OF SAME.

COMMISSIONERS OF SEWERS OF CITY OF LONDON AND VICAR AND PARISHIONERS OF ST. BOTOLPH WITHOUT ALDGATE *v.* PARISHIONERS OF SAME.

cemented as to prevent the escape of effluvia into the church, the flooring of the crypts to be covered with concrete.

Subsequently the Commissioners of Sewers of the City of London and the vicar and churchwardens of the parish presented a petition praying the Court to grant a faculty authorizing the human remains, directed by the above order of February 28, 1891, to be placed in the crypts of the church—known as the tower crypt and the church crypt—to be removed to the Ilford Cemetery, together with all other human remains which might be found to have been previously placed in the vaults of the crypt above the flooring.

On August 18, 1891, the Court was moved by *Atlay* to issue the faculty prayed for on the ground that the crypts, owing to their state and construction, and to there being in one of them a furnace for heating the church, could not be so hermetically sealed as to ensure effluvia not escaping into the church, and that the retention of human remains in the crypts would be injurious to the health of the congregation as well as to the neighbourhood.

After hearing evidence in support of this petition, the chancellor intimated that, having regard to the 35th section of the City of London Sewers Act, 1851 (1), he had jurisdiction to

(1) The 34th and 35th sections of this Act provide as follows:

Sect. 34: "That it shall be lawful for the Commissioners with the consent of the Bishop of London to cause any churchyard or burial ground within the City, after the same shall have been finally closed, to be planted, paved, or otherwise covered over or any part thereof, and if the surface of such churchyard or burial ground shall be above the level of the adjoining ground to cause the same to be levelled, and for such purpose to dig or carry away the soil of such churchyard or burial ground."

Sect. 35: "Provided always that the Commissioners shall cause any churchyard or burial ground to be lowered, the graves and vaults in such churchyard or burial ground shall be as little disturbed as possible, and it shall be lawful for the relatives of any deceased person whose body may within the last twenty years have been interred or deposited in any grave or vault which may be so disturbed, to cause the remains of such person to be removed, carried away, and placed in some other churchyard or burial ground in such manner as the Bishop of London, or such person as he may appoint may direct, and the expenses of such removing, carrying away, and placing, not exceeding in any case the sum of ten pounds, shall be paid by the Commissioners, and the remains of such persons as shall have been interred or deposited in the graves or vaults so disturbed as aforesaid, which

1891

VICAR AND ONE OF THE CHURCH-WARDENS OF ST. BOTOLPH WITHOUT ALDGATE *v.* PARISHIONERS OF SAME.

VICAR AND CHURCH-WARDENS OF ST. BOTOLPH WITHOUT ALDGATE *v.* PARISHIONERS OF SAME.

COMMISSIONERS OF SEWERS OF CITY OF LONDON AND VICAR AND PARISHIONERS OF ST. BOTOLPH WITHOUT ALDGATE *v.* PARISHIONERS OF SAME.

authorize the removal of the human remains taken out of the churchyard and placed in the crypts to another consecrated burial ground, and directed a faculty sanctioning the issue of a faculty as prayed for the removal to the Ilford Cemetery of all such human remains not found in coffins, but directed that the faculty should lie in the registry for fourteen days, and adjourned the hearing of the petition so far as it prayed for the removal of human remains in coffins found in the churchyard and the vaults of the church crypt.

1891. Nov. 12. Notice having been given of opposition to the issue of the faculty decreed on August 18, 1891, and to the prayer of the last-mentioned petition being granted, such petition came on again for hearing.

Atlay, appeared for the petitioners.

Colonel Harris, an opponent, appeared in person.

Witnesses were examined orally. The result of their evidence appears from the following judgment.

Cur. adv. vult.

1891. Nov. 20. DR. TRISTRAM. The questions raised in this case are of considerable public importance, and some of them of first impression.

The Court is asked to issue a faculty for three purposes—first, to authorize the removal of some 100 boxes of dry bones from a vault in the crypt under the north aisle of the church, where they have been recently placed, to the present consecrated burial ground of the parish at Ilford, for reinterment there; secondly, to authorise the removal of forty-one coffins containing the remains of deceased persons from the tower crypt, where they have been recently placed, to the same burial ground for reinterment; thirdly, to authorize the removal of all coffins that may be found in the vaults in the crypt underneath the church which are above the level of the floor of the crypt to the same burial ground also for reinterment.

---

shall not be removed or carried away as aforesaid, shall (except such graves or vaults as shall be finally closed up) at the expense of the Commissioners be removed from such graves or vaults and be interred in such manner as the Bishop of London or such person as he shall appoint shall direct."

1891

VICAR AND ONE OF THE CHURCHWARDENS OF ST. BOTOLPH WITHOUT ALDGATE *v.* PARISHIONERS OF SAME.

VICAR AND CHURCHWARDENS OF ST. BOTOLPH WITHOUT ALDGATE *v.* PARISHIONERS OF SAME.

COMMISSIONERS OF SEWERS OF CITY OF LONDON AND VICAR AND PARISHIONERS OF ST. BOTOLPH WITHOUT ALDGATE *v.* PARISHIONERS OF SAME.

Dr. Tristram.

The petitioners for the faculty are the vicar and churchwardens of the parish, and the Commissioners of Sewers, who constitute the sanitary authorities for the City of London, and their application is based on the ground that it is essential for the health of persons attending the church, and possibly to the neighbourhood, that the orders asked for should be made.

The application is opposed by Colonel Harris, a former parishioner, in person, on private as well as on public grounds. It appears that his grandfather was buried about the beginning of the century in that portion of the churchyard from which the bones in the boxes were excavated, and he objects, first, to their having been disturbed at all, and secondly, to their being removed from the place of burial, to which they had been solemnly committed by the burial service of our Church at the time of their burial.

Colonel Harris was not in England, when the faculty was granted to enable the street abutting on the north and east side of the churchyard to be widened, and which necessitated the excavation of the bones, and the first information he received of what had been done, and of what the Court is now asked to do, was from a report in the *Times* newspaper of the proceedings of this Court on the 19th of August last. He, thereupon, promptly gave notice in the registry, that he should oppose the application, and on the last court day he stated clearly and forcibly the grounds, on which he considered the Court ought to reject it.

The Court will consider, in the first place, the public or general grounds on which he objects to the application being granted. His objection is shortly this, that this churchyard having been consecrated and set apart for the burial of the dead ought not to have been desecrated, as he contends it has been, by being appropriated for the purpose of widening the adjoining streets.

There can be no doubt that, as a rule of law, Colonel Harris's contention that a churchyard ought not to be desecrated is correct. When a piece of ground has been once set apart by a sentence of consecration for the burial of the dead, it comes under the exclusive jurisdiction and protection of the Ecclesiastical Courts, and cannot afterwards be appropriated to profane or common uses.

1891

VICAR AND ONE OF THE CHURCH-WARDENS OF ST. BOTOLPH WITHOUT ALDGATE *v.* PARISHIONERS OF SAME.

VICAR AND CHURCH-WARDENS OF ST. BOTOLPH WITHOUT ALDGATE *v.* PARISHIONERS OF SAME.

COMMISSIONERS OF SEWERS OF CITY OF LONDON AND VICAR AND PARISHIONERS OF ST. BOTOLPH WITHOUT ALDGATE *v.* PARISHIONERS OF SAME.

Dr. Tristram.

The first question here is, whether the appropriation by faculty of a portion of a churchyard, which has been closed for burials, for widening an adjoining thoroughfare, is, in ecclesiastical law, a desecration?

No alteration can lawfully be made in any church or churchyard unless sanctioned by a faculty. In churchyards there are certain alterations, which by practice and in accordance with precedent, the Ecclesiastical Courts have from early times been accustomed to authorize by faculty, such as the enlarging of a church, the erection or enlargement of a vestry, the making of footways in or through a churchyard for public convenience, the making of a carriage drive up to the church door, and the construction of necessary drains. To enable such alterations to be made, it is frequently necessary to remove the remains of persons buried in vaults or graves situated in the ground required for the alterations. And upon the Court being satisfied, that such an alteration is desirable, and that it cannot be made without the removal of a vault and the remains in it, or without the removal of remains in a common grave, it invariably orders the removal of the vault and remains in it, or of the remains in a common grave to another part of the churchyard, after citing and giving notice to the families interested in the vault or common grave of the proposed removal. And the practice of the Court is to give effect to their wishes, as far as is practicable, in the selection of the site for the new vault or grave, and to afford them an opportunity of superintending the removal.

It is sometimes erroneously supposed, that the owner of a faculty vault in a church or churchyard has a freehold interest in it. But this can only happen where a vault is in a private chapel or private aisle, the fee of which is in the owner of the chapel or aisle. For the fee of a church or churchyard is by law in perpetual abeyance, whilst the freehold of the chancel is vested in the rector, and of the church and churchyard in the incumbent; but in both cases for the use of the parishioners. The final control of the church and chancel and of the churchyard is vested in the chancellor, as ordinary for this purpose. It is by virtue of this control, that chancellors formerly granted faculties for vaults in churches, or churchyards, and latterly in church-

1891

VICAR AND ONE OF THE CHURCH-WARDENS OF ST. BOTOLPH WITHOUT ALDGATE *v.* PARISHIONERS OF SAME.

VICAR AND CHURCH-WARDENS OF ST. BOTOLPH WITHOUT ALDGATE *v.* PARISHIONERS OF SAME.

COMMISSIONERS OF SEWERS OF CITY OF LONDON AND VICAR AND PARISHIONERS OF ST. BOTOLPH WITHOUT ALDGATE *v.* PARISHIONERS OF SAME.

Dr. Tristram.

yards only, but in every such faculty there is a proviso saving the jurisdiction of the Court.

It is obvious, that as the freehold of the ground in which the vault is erected never was in the chancellor, it could not pass to the owner of the vault by the faculty, and it is clear law, that the incumbent could not grant it away. What is really granted by the faculty is the use of the ground for a vault, so long as it is not required for the general use of the parishioners, and when it is so required, by the practice of the Ecclesiastical Courts, the owner of the vault is entitled to have it removed to another site in the churchyard at the cost of the applicant for the faculty.

The Court, having clearly jurisdiction to make footways in or through a churchyard for public convenience, and to make a carriage drive up to a church door in a churchyard without committing an act of desecration, the question arose upwards of twenty years ago whether, under a change of times or circumstances, it was not justified in going a step further by sanctioning by faculty the outside portion of a closed churchyard being used as a part of a public footpath or highway, where it was shewn that such a concession would conduce to the convenience of the congregation attending the church as well as to that of the general public.

It had been contrary to the decisions of the Ecclesiastical Courts up to that date to sanction the curtailment of a churchyard used for burials for the purpose of widening a public thoroughfare. But it occurred to my predecessor in this Court, as well as to myself subsequently, that those decisions were inapplicable to the case of churchyards closed for burials situated in crowded thoroughfares, where it was proved, that the congested state of traffic inconvenienced those who attended the services of the church as well as the public, and that it could only be conveniently remedied by permitting a strip of the churchyard to be thrown into the thoroughfare.

Upwards of nineteen years ago, by the request of the late Bishop of London and some of the principal London vestries, I gave this subject my best consideration. Prior to that time, it had been the practice of the London vestries to obtain a private and local Act of Parliament, at the cost of 400*l.*, to effect this

1891

VICAR AND ONE OF THE CHURCH-WARDENS OF ST. BOTOLPH WITHOUT ALDGATE *v.* PARISHIONERS OF SAME.

VICAR AND CHURCH-WARDENS OF ST. BOTOLPH WITHOUT ALDGATE *v.* PARISHIONERS OF SAME.

COMMISSIONERS OF SEWERS OF CITY OF LONDON AND VICAR AND PARISHIONERS OF ST. BOTOLPH WITHOUT ALDGATE *v.* PARISHIONERS OF SAME.

Dr. Tristram.

object; and it was the opinion of both the bishop and the vestries, that if the Court had jurisdiction to give the desired relief, the exercise of it would be a great satisfaction to the parishioners, as it would not only be a saving of expense, but would also enable them to appear before the Court, and state what their wishes were with regard to the removal and reinterment, of the remains of members of their families.

The first application of the kind that came before me in this Court was on the part of the vicar and churchwardens of the parish church of Kensington. In that case, it was proved to my satisfaction, that it was essential for the comfort of many of the parishioners attending the church, as well as for the convenience of the public, that there should be a public footpath either inside or outside the churchyard, along one side of it. There were objections to my authorizing a footpath being made inside the churchyard; for which there were precedents, as it might expose the churchyard, especially at night, to injury. I therefore ordered the boundary fence of the churchyard to be placed back, and granted, by faculty, to the local authorities the use of a strip of the churchyard outside the new boundary fence for a public footpath, so long as it might be required for the public use; and in case of its not being so required, I ordered that it should revert to the use of the church.

I found, on inquiry in the registry, that my predecessor had granted one faculty of the kind; and, since the granting of the Kensington faculty, it has been the uniform practice of this Court, upon a proper case being made out by evidence, to grant by faculty to the local authorities the use of strips of the churchyard for enlarging adjoining thoroughfares upon similar terms, and this practice has been followed in several other Diocesan Courts.

The principle upon which the Court holds, that it has jurisdiction to grant such faculties, is, that there is a discretionary power vested in it as to making orders relating to churchyards; and that it is the duty of the Court to exercise this discretion reasonably, and, as Sir John Nicholls observes, "to vary the exercise of it according to the change of times and circumstances;" and that during the last twenty-five years there has been such a change of

1891

VICAR AND ONE OF THE CHURCH-WARDENS OF ST. BOTOLPH WITHOUT ALDGATE *v.* PARISHIONERS OF SAME.

VICAR AND CHURCH-WARDENS OF ST. BOTOLPH WITHOUT ALDGATE *v.* PARISHIONERS OF SAME.

COMMISSIONERS OF SEWERS OF CITY OF LONDON AND VICAR AND PARISHIONERS OF ST. BOTOLPH WITHOUT ALDGATE *v.* PARISHIONERS OF SAME.

Dr. Tristram.

circumstances, owing to the great increase of traffic in the City and in other frequented parts of the metropolis, as to warrant the Court in granting such faculties for the convenience of those who attend church, as well as for that of the general public.

In the present case, it was established by evidence, that the thoroughfare proposed to be widened, was inconveniently and dangerously narrow; that the crossing to the church was consequently dangerous, and that the widening of it would be a great comfort and convenience to church-goers, as well as to the public.

The Court thereupon held that it was its duty to grant the faculty, and it still adheres to this opinion.

There remain two further questions for the consideration of the Court: 1. Whether it is necessary, for the health of the congregation or neighbourhood, that the coffins and bones in question should be removed from the crypts in which they are now placed; and, 2. Whether, if their removal is necessary on sanitary grounds, the Court has jurisdiction or authority to order their removal to Ilford Cemetery?

The evidence of Dr. Saunders, the Medical Officer of Health for the City of London, and of Dr. Dudfield, the Medical Officer of Health for Kensington, both of whom have recently inspected the crypts, coupled with the evidence of Mr. Rish, Clerk of the Works to the Commissioners of Sewers, given on the last Court day, as to the state of the remains in some of the coffins after the vault had been fully opened, and during their removal to the tower crypt, satisfied the Court that on sanitary grounds the coffins and bones of bodies ought not to be permitted to remain either in the tower crypt or in the church crypt. When they were ordered to be placed there by the Court in February last, the condition of the remains in the coffins was unknown, and they were placed there with the concurrence of the parochial authorities, and of the Commissioners of Sewers; and, on evidence that, if the vaults in which they were ordered to be placed were hermetically sealed with concrete, no harm in a sanitary point of view could accrue. But it now appears, that the crypts cannot be hermetically sealed in consequence of there being cracks in some of the arches, and to there being also a

1891

VICAR AND ONE OF THE CHURCHWARDENS OF ST. BOTOLPH WITHOUT ALDGATE. *v.* PARISHIONERS OF SAME.

VICAR AND CHURCHWARDENS OF ST. BOTOLPH WITHOUT ALDGATE *v.* PARISHIONERS OF SAME.

COMMISSIONERS OF SEWERS OF CITY OF LONDON AND VICAR AND PARISHIONERS OF ST. BOTOLPH WITHOUT ALDGATE *v.* PARISHIONERS OF SAME.

Dr. Tristram.

large heating apparatus in one of the vaults underneath the church, which has a tendency to rarefy the air, and to attract foul gases, and might conduct them into the interior of the church; and the creation of the rarefied air would, in the opinion of Dr. Saunders, favor the porosity of the bricks and cement. He also stated, that if there was a flat surface above the vaults, with no liability to cracks or settlements in the vaults, and nine inches of good concrete were laid on the surface and liquid cement were poured on it and then grouted in, it would hermetically seal the church from effluvia from the vaults. But in the present case there is no flat surface upon which the concrete could be placed on the arches so as to secure it from cracking owing to possible settlements in the arches.

The present church was built in 1741, and having regard to the condition of the arches, and the heated air in the crypts from the furnace, the Court has come to the conclusion that the coffins in the crypts and the bones there cannot be permitted to remain in the crypts without danger to the health of the congregation, and of the neighbourhood.

It remains for the Court to determine, whether it has jurisdiction to make an order for their removal to the consecrated portion of the Ilford Cemetery, which, under the provisions of the Burial Acts, is now the parochial burial ground for this parish. The Court has exclusive jurisdiction over the church and churchyard in relation to the alterations to be made therein, and in relation to making orders for the removal of remains buried in either place. It frequently grants faculties, under proper precautions, for the removal of remains from a churchyard or consecrated burial ground to another churchyard or consecrated burial ground on the petition of the personal representatives or members of the family of the deceased. It frequently orders the removal of remains from one part of a churchyard to another part of the same churchyard without consents, when such removal is required for the purpose of making alterations in the church or churchyard for the convenience of parishioners. It is the paramount duty of the Court to make such orders as may be necessary to enable the congregation to attend Divine Service without danger to health. The Court is, therefore, of opinion

1891

VICAR AND ONE OF THE CHURCH-WARDENS OF ST. BOTOLPH WITHOUT ALDGATE *v.* PARISHIONERS OF SAME.

VICAR AND CHURCH-WARDENS OF ST. BOTOLPH WITHOUT ALDGATE *v.* PARISHIONERS OF SAME.

COMMISSIONERS OF SEWERS OF CITY OF LONDON AND VICAR AND PARISHIONERS OF ST. BOTOLPH WITHOUT ALDGATE *v.* PARISHIONERS OF SAME.

Dr. Tristram.

that upon its being satisfied, that it is necessary for remains to be removed from a church or churchyard to another consecrated burial ground in the interests of the health of the congregation and neighbourhood, it has jurisdiction to entertain an application for such an order as is now asked for, and that its duty is to make such order. The order of the Court, therefore, will be that the faculty decreed on the 18th of August last, issue forthwith with the following provisoes and orders inserted therein, firstly: That the 100 boxes containing the remains be reinterred on the left side of a separate site in the consecrated portion of the Ilford Cemetery, the site to be selected by the petitioners and the said J. Harris; any difference between them as to the site, to be referred to the Judge in Chambers; and J. Harris to have three days' notice of the removal of the boxes, with liberty to attend on the occasion by himself or his agent. Secondly, that the petitioners remove the forty-one coffins in the tower crypt, and the coffins placed above the floor in the church crypt for reinterment on the right side of the same site. Thirdly, that the said site be surrounded by a kerb stone with a memorial stone in the centre, stating, that on the left side are interred the 100 boxes of remains removed from the churchyard, and amongst the remains are those of John Harris, formerly resident in the parish, and buried there about 1800; the grandfather of the said J. Harris; and that on the right side have been reinterred the coffins removed from the tower and church crypts under this order; and lastly, that there be affixed in a frame against the wall of the vestry a statement on parchment of the removal of the said bones of remains and coffins to the site in the Ilford Cemetery in accordance with the above order.

Solicitors for petitioners: *Lee, Bolton & Lee.*

C. F. J.

[IN THE CONSISTORY COURT OF LONDON.]

1892
Feb. 18.

THE VICAR AND CHURCHWARDENS OF ST. BOTOLPH WITHOUT ALDGATE *v.* THE PARISHIONERS OF THE SAME AND OTHERS.

Ecclesiastical Law—Churchyard closed for Burials—Faculty for Laying out Churchyard as Public Garden — Metropolitan Open Spaces Act, 1881 (44 & 45 *Vict. c.* 34), *s.* 5—*Order as to Private Vaults.*

Where a faculty had been decreed to issue allowing a churchyard, closed for burials and containing two private vaults, one in repair and the other out of repair, to be laid out as a public garden, subject to future order as to how such vaults were to be dealt with, the Court made an order that there should be no interference with the vault in repair, but that the vault out of repair should be levelled with the ground and filled up.

Rule of the Court in such cases.

In this cause the Court, on August 18, 1891, granted a faculty authorizing the churchyard, adjoining the parish church of St. Botolph without Aldgate, in the city of London—a churchyard closed for burials by Order in Council—to be planted and laid out as a public garden (1), subject to any order the judge might, after visiting the churchyard, make in reference to the vaults therein; and on February 18, 1892, the Chancellor of London (Dr. Tristram, Q.C.), after visiting the churchyard, delivered the following judgment in reference to two private vaults in the portion of the churchyard dealt with by the faculty:—(2)

Dr. Tristram. In this case, the Court, on August 18, 1891, by faculty, authorized the closed churchyard of St. Botolph without Aldgate to be planted and laid out as a public garden, subject to the usual provisions relating to the preservation of gravestones, and directed that no vaults should be interfered with without its express sanction. There are only two

(1) See the Metropolitan Open Spaces Act, 1881, c. 34, s. 5.

(2) See the *Commissioners of Sewers of the City of London and the Vicar and Churchwardens of St. Botolph without Aldgate* v. *The Parishioners of the Same, &c.*, ante, p. 161, as to the appropriation of a portion of the same churchyard for the widening of an adjoining public thoroughfare.

1892

VICAR AND CHURCHWARDENS OF ST. BOTOLPH WITHOUT ALDGATE *v.* PARISHIONERS OF SAME.

Dr. Tristram.

vaults with which it was proposed to intermeddle—one erected for the use of the family of John Gibbon in 1765, close to the north end of the church, and the other in 1801, for the use of the family of James Sidney, about the centre of the north end of the churchyard. I recently visited the churchyard for the purpose of inspecting the vaults and works. The Gibbon vault is in a state of dilapidation; but the Sidney vault is in good, substantial repair. The rule of the Court in these cases is, where a private vault is in good repair not to interfere with it without the consent of the family, but where it is in a dilapidated condition, unless the family come forward to repair it, to order it to be levelled with the ground and filled up, taking care that all memorial slabs belonging to it on which the inscriptions are legible be carefully preserved in the churchyard, and placed as near the vault as convenience will permit. The reason of this rule is, that it is the duty of the family, and not that of the vestry, to keep private vaults in repair; but it is the duty of the vestry to keep the churchyard in sanitary and decent order. The Court, therefore, orders the Gibbon vault to be levelled with the ground and filled up, and the memorial slabs at the end and side to be placed against the north wall of the church, and the other slabs to be buried over the vault, and that the Sidney monument and vault remain undisturbed.

Solicitors for petitioners: *Horne & Birkett.*

C. F. J.

[IN THE ARCHES COURT OF CANTERBURY.]

1892
March 25.

O'MALLEY *v.* THE BISHOP OF NORWICH.

Ecclesiastical Law—Appeal in Criminal Suit—Church Discipline Act (3 & 4 Vict. c. 86), s. 15—Security for Costs.

A criminal suit, under the Church Discipline Act (3 & 4 Vict. c. 38), having been promoted against the incumbent of a parish, and proof given of the charges made in the articles in the suit, the bishop of the diocese pronounced sentence suspending the defendant for two years ab officio et beneficio, and condemning him in the costs of the proceedings. The defendant appealed to the Court of Arches.

On motion on behalf of the bishop, who had promoted his own office and appeared as respondent in the appeal, the Dean of Arches, on proof that the defendant was in a state of poverty, and had not paid any part of the costs in which he had been condemned, ordered the defendant to give security for the costs of the appeal in the sum of 100*l.* within four months from the date of making the order for security.

THIS was an appeal, under the 15th section of the Church Discipline Act (3 & 4 Vict. c. 86), from the sentence of the Bishop of Norwich, pronounced in a criminal suit promoted by the said Bishop of Norwich of his own mere motion against the Reverend Bryan O'Malley, vicar and perpetual curate of Flitcham, in the county of Norfolk and diocese of Norwich, and heard before the said bishop, sitting with three assessors, under s. 11 of the same Act, after commissioners appointed under the Act had reported that there were sufficient primâ facie grounds for instituting further proceedings against the defendant. By the sentence appealed from, the Bishop of Norwich (on December 10, 1891) pronounced that the charges against the defendant mentioned in the report of the commissioners and the articles in the suit were proved; that the defendant be suspended for the space of two years from the time of publishing the suspension from the discharge and execution of all the functions of his clerical office in the parish and parish church of Flitcham and elsewhere within the diocese of Norwich, and from receiving any of the profits and benefits of the said benefice; that at the expiration of the said two years the defendant should exhibit and leave in the registry of the Consistory Court of Norwich an approved certificate of his

1892

O'MALLEY v. BISHOP OF NORWICH.

good behaviour and morals during the term of his suspension, otherwise that the suspension be not taken off or relaxed, and that the defendant be condemned in the costs of all proceedings taken by the Bishop of Norwich against the defendant under the Act and otherwise incidental thereto.

Against this sentence the defendant appealed, and an inhibition and citation having issued out of the registry of this Court on January, 28, 1892, inhibiting the Bishop of Norwich, his surrogate, or surrogates registrar, &c., pending the appeal and citing the said bishop to enter an appearance on the sixth day after service thereof, and then and there answer to the appellant in his cause of appeal the bishop appeared as respondent, and his solicitors on February 18 last gave notice of motion that they would by counsel move the judge in chambers for an order that the appellant do give security for the costs of the appeal as to the said judge might seem meet.

In an affidavit brought in support of the motion, the legal secretary of the Bishop of Norwich deposed that the appellant had been ordered in November, 1881, and February, 1882, by orders made by the President of the Probate, Divorce, and Admiralty Division of the High Court of Justice, in a suit of judicial separation brought against the appellant, to pay permanent alimony at and after the rate of 100*l.* per annum, and the sum of 203*l.* 1*s.* 3*d.* taxed costs; that in 1882, a writ of sequestration of the benefice of Flitcham having previously issued in May, 1882, for levying the sum of 123*l.* 1*s.* 3*d.*, part of the said costs, and the sum of 75*l.*, being the balance of alimony then due from him, with interest, a sequestration of the benefice had been duly granted pursuant to the said writ, and remained in force until November, 1888; that according to the information and belief of the deponent, the appellant had not paid any further amount in respect of the permanent alimony due from him since the said sum of 75*l.* and interest levied under the sequestration; that the appellant had been condemned in the costs of the present suit and of the inquiry under the Church Discipline Act preliminary thereto, amounting to the sum of 82*l.* 0*s.* 10*d.*; but that neither the said sum of 82*l.* 0*s.* 10*d.*, nor any part thereof, had been paid either to the Bishop of Norwich or the deponent, and that

according to the information and belief of the deponent, the appellant was without means, being practically in a state of poverty, and that he would be quite unable to pay any costs in the event of his failing in his appeal.

An affidavit in opposition made by the appellant alleged inter alia, that the benefice of Flitcham, which was being served by a curate appointed by the bishop at a stipend of 180*l.* by the year, to be paid out of the emoluments of the living, was of the net value of 200*l.* per annum, and since December, 1891, had been sequestrated by the Bishop of Norwich in security for his costs.

1892. March 17. *Dibdin*, on behalf of the respondent, moved the Dean of Arches (The Right Honourable Lord Penzance) in accordance with the notice of motion.

[He referred to the Rules of the Arches Court of February 13, 1830, par. 13 (1), and to *In re Strong*. (2)]

The appellant appeared in person.

Cur. adv. vult.

1892. March 25. The following judgment was now delivered in Court:—

LORD PENZANCE. The defendant in this case has been convicted of drunkenness by the bishop, sitting with several assessors, and sentenced to a suspension of two years. He has appealed to this Court. The Church Discipline Act, s. 15, has provided that an appeal of this kind shall be heard in the same manner as if sent to this Court by letters of request—that is to say, as "res integra." This is hardly an appeal as commonly understood, but substantially nothing less than a new trial with fresh evidence.

The bishop asks that the defendant shall be required to give security for costs.

No second trial such as this, so far as I can call to mind, is permitted in any other branch of the judicature. There is no

(1) Orders of Court made the 4th session of Hilary Term (February 13, 1830): . . . . "13. That in all cases, the Court may, upon application made to it, direct security for costs to be given by either, or all of the parties." "(Signed) J. Nicholl, Official Principal of the Court of Arches." (See 2 Hagg. Eccl. XVI; *Turton* v. *Turton* (3 Hagg. Eccl. 346), and Rules of the Arches Court of Canterbury, 1867. Introduction (printed 36 L. J. Eccl. 1).

(2) 31 Ch. D. 273.

1892

O'MALLEY v. BISHOP OF NORWICH.

Lord Penzance.

second trial of facts in any of our criminal courts, and in the Courts of Common Law a new trial is only granted when the first trial has for some reason not been a fair one, or legally conducted, unless the Court is convinced that the verdict was against the weight of evidence.

If security for costs is a reasonable thing in any case, it is pre-eminently so in this. The bishop has already had to provide the means for bringing the case, with eight or nine witnesses (who all swore to the drunkenness), before the commissioners, and then for proving the offence over again before himself and three assessors. The defendant has, it is true, been condemned in the costs of these proceedings; but he has not paid any part of them. And now the bishop, under the very peculiar provisions of the Act, is called upon to prove the case all over again for a third time against a defendant who avows that he has no resources. It is difficult to believe that the clause in the Act which gave an appeal of this sort was inserted advisedly and its consequences appreciated by the legislature. For it offers to every defendant a new trial at his own volition in any case that has gone against him, and it is calculated to exhaust the patience if not the purse of the promoter.

The bill now passing through the legislature will, it may be hoped, put an end to such an anomaly. (1) The bishop's application must be granted. The defendant suggests the proceeds of his living as security, but they offer no security at all in case of his death or resignation.

The counsel for the respondent asks that the security for costs shall be in the sum of one hundred pounds. This sum, I am told by the registrar, is the ordinary amount required in criminal suits coming before the Court by virtue of letters of request, and should, I think, be the sum in which security ought to be given in this case. The security given must be security to the satisfaction of the registrar, and in default of such security being given by the appellant within four months of the present time, the appeal is to stand dismissed.

Solicitors for respondent: *Brooks, Jenkins & Co.*

(1) See The Clergy Discipline (Immorality) Bill (H. L.) (Bill 239) read the second time in the House of Commons, April, 1892.

C. F. J.

[IN THE COURT OF APPEAL.]

C. A.
1892
March 10.

THE MERCHANT PRINCE.

Admiralty—Collision—Vessel at Anchor—Steam Steering Gear — Inevitable Accident—Burden of Proof.

In an action of damage by collision, it appeared that the plaintiffs' vessel was at anchor in the Mersey when the defendants' steamer ran into her in broad daylight.

The defence was that the steam steering gear of the defendants' vessel failed to act in consequence of some latent defect, or obstruction, which could not have been ascertained or prevented by the exercise of any reasonable care or skill on the part of the defendants, and that the collision and damage were caused by inevitable accident.

The steam steering gear in question was good of its kind; it had never previously failed to act, and the cause of the defect in the machine, or of the obstruction in the working, could not be discovered by competent persons. Part of the gear, including some portion of the chain, running between the wheel and the rudder, had been recently renewed, and it was admitted that new chain is liable to stretch, but it was proved that before the vessel left her anchorage to proceed on her voyage, the whole of the gear had been tested and found in good order, and that the chain had been tightened up as occasion seemed to require:—

Held, by the Court of Appeal (reversing the decision of the President, ante, p. 9), that the defendants were liable, as they had not satisfied the burden of proof, for, in order to support the defence of inevitable accident, and disprove the primâ facie evidence of negligence, it was necessary for them to shew that the cause of the accident was one not produced by them, and the result of which they could not avoid, but the defendants knew of the tendency of new chain to stretch, and therefore that an accumulation of links at the leading wheels might possibly cause jamming, and, considering the crowded condition of the river where the accident occurred, the use—or readiness for immediate use—of hand, instead of steam, steering gear, was a means by which the result could have been avoided.

Per Fry, L.J.: The defendants had failed to sustain the plea of inevitable accident, as it was necessary for them either to shew what was the cause of the accident, and that though exercising ordinary care, caution, and maritime skill, the result of that cause was unavoidable, or to enumerate all the possible causes, one or other of which might have produced the effect, and shew with regard to every one, that the result was unavoidable.

The definition of inevitable accident in *The Marpesia* (Law Rep. 4 P. C. 212) approved.

APPEAL by plaintiffs, the owners of the *Catalonia*, from a decision of the President, dated November 11, 1891, dismissing

C. A. 1892

THE MERCHANT PRINCE.

with costs, their action of damage by collision against the defendants, the owners of the *Merchant Prince*, on the ground that the collision was the result of inevitable accident.

The facts are fully set out in the report of the case in the Court below. (1) In substance the plaintiffs' case was that:

On March 4, 1891, about 10.30 A.M., the *Catalonia*, a screw steamer, owned by the plaintiffs, was lying at anchor in the Mersey, when the *Merchant Prince*, a screw steamer belonging to the defendants, and coming down the river, with her stem struck the *Catalonia* a heavy blow on the port quarter, doing very considerable damage.

The defendants pleaded that the collision and damage were caused by inevitable accident, and the evidence shewed that at the time the *Merchant Prince* was proceeding down the Mersey, there was a moderate gale blowing from the westward, and, it being slack water, the *Catalonia* was lying wind-rode partly athwart the river. She was observed to be about half a point on the port bow at about a mile distant. Owing to the force of the wind the *Merchant Prince* griped a little as she approached the *Catalonia*, so that her head came over somewhat to port. The pilot thereupon gave the order "port," and then "hard a port," but the third officer, who was steering, on trying to get the wheel over to port, found that the steering gear would not act, and on calling out that the wheel was jammed, the engines were put astern, but the vessels were too close for the collision to be avoided.

The apparatus in question was one of G. D. Davis & Co.'s patent vertical hand and steam gears, worked from amidships, and was connected with the rudder by a stud-link chain passing over a gipsey pulley keyed to the driving shaft. From this the chain passed under guiding pulleys on either side, and so to large pulleys on each side of the vessel. Aft of this the chain was connected by tightening screws to iron rods running in a straight line, and guided right aft, until again connected to chains leading to the quadrant on the rudder head. The length of the studded chain was about twenty feet, the rest being ordinary chain without studs.

(1) Ante, p. 9.

This gear had been supplied to a number of vessels belonging to the defendants. It had been in use on board the *Merchant Prince* for some years. It had been found to work well, and had never previously gone wrong. In the river, prior to the accident, it had been necessary to port and starboard the helm, but no difficulty had been experienced. Owing to an accident part of the gear had been renewed, including a portion of the chain running between the wheel and the rudder. As new chain has a tendency to stretch, the tightening screws are available to take in the slack, and it was in evidence that on the way to her anchorage before the collision, five inches of slack had been taken in, and that when she came to an anchor after the collision $1\frac{1}{8}$th inch on the port chain had been taken in; also that subsequently before reaching the West Coast of Africa, nineteen links of the chain had been cut out, and that the vessel had got aground in the Congo through the jamming of the wheel; but before the vessel's departure prior to the collision, the whole of the gear had been examined and tested both under steam and by hand, and pronounced in good order, and since the collision a careful examination by competent persons had failed to discover the cause of the jamming.

It was suggested by the plaintiffs as possible causes of the jamming either that the stop valve, in the wheelhouse under the bridge, had been shut, or that the new chain had stretched to such an extent that the slack had accumulated at one of the leading wheels, and acting as a wedge, had locked it.

The hand gear amidships involved the use of the same chains, but there was a wheel aft, worked by hand and not connected with these chains. This wheel would, however, take two or three minutes to connect with the rudder, and it was alleged that there was no time to do this before the collision occurred.

THE PRESIDENT (SIR CHARLES BUTT), after consultation with the Trinity Brethren, held that the defendants had satisfied the onus cast upon them of proving that there was no negligence on their part, and, with reference to the two suggestions of the plaintiffs, the learned judge said, "it has been suggested that

C. A. 1892

THE MERCHANT PRINCE.

The President.

some one or more of the stop-valves were shut when they ought to have been left open. Well, the direct affirmative evidence from the defendants on that point is strong enough, and would of itself, I think, have satisfied me that that was not the cause of the accident, and as one of the Trinity Brethren has pointed out, you may shut all the valves, but it will not jam the machinery. It will keep the steam out of the steering gear, and the rudder will not act, but the machinery will not be jammed; and, therefore, it appears to me clear that the shutting of one of these stop-valves was not the real cause of the collision. Then it is suggested that the cause of the collision probably was that the chains, either those on the bridge, which were attached to the steam steering-gear, or those aft, were not properly tightened up. Well, we have considered that, and I must say that the effect on my mind of the evidence is that there was no negligence in that respect; that the officers did their duty, and that there was no jamming of the chains and no stopping of the machinery in that way; or, even if there were, that there was no negligence, at all events, on the part of the officers in the matter" . . . and on the general question of the negligence of the defendants the learned judge said: "The defendants had taken all precautions and care to have it (the steam steering-gear) properly repaired by competent people; but it did jam from something which may be called a latent defect. For some reason or other, the machinery at the critical moment (having answered perfectly well in the steering of the vessel in the river the day before, and until this accident on this day), got fixed. The wheel could not be used, and so the accident was brought about. It is, however, true that the defendants have not done what has been done in many of these cases, they have not laid their finger on the defect, or the precise cause of the refusal of this machinery to act. In most cases that I recollect where the defendant has been absolved from the consequences of some latent defect in the machinery, the defect has been discovered after the accident; but that is not a necessary part of the defendant's case if he satisfies the Court that there were causes which he cannot put his finger on."

On appeal,—

C. A. 1892

THE MERCHANT PRINCE.

Sir Walter Phillimore, and *J. P. Aspinall*, for the appellants (plaintiffs), the owners of the *Catalonia*. The defendants did not discharge the onus which lay upon them to shew that they were not negligent in the management of their ship, for they did not put their finger on the cause of the defect in the machine or obstruction in the working. Either the steam steering gear was dangerous, or it was badly managed. The defendants knew that new chain has a tendency to stretch, and if the stretching was, or might be, such that the defendants could not properly control it, then the machine was dangerous, and the defendants are liable for using it in a crowded river like the Mersey. *The European*. (1) If the stretching of the chain could have been properly controlled, but the servants of the defendants failed to do so, then the machine was badly managed, and the defendants are liable. In any event as the suddenness of the action of the steam is more likely to cause kinks in the chain, the hand gear should have been available to meet an emergency, and if, in case of need, men had been stationed ready to use the wheel aft, the chains in question might have been immediately thrown out of gear and the vessel steered without them. [They were stopped by the Court.]

Myburgh, Q.C., and *A. D. Bateson*, for the respondents (defendants). It is precisely in a river like the Mersey that the advantage of the use of steam steering gear is felt, as the action of the helm is more rapid and more efficient, and the owners of the *Merchant Prince* discharged the burden upon them of shewing that there was no negligence in its use, as the process of exhaustion of possible causes of the accident was not only nearly complete, but all that could reasonably be required. The decision below was right, and to hold otherwise would be to alter the law, and to make the liabilities of the owner of a ship more onerous than before. The defendants do not guarantee the machinery, but so far as they knew, the machine was perfect in the sense that it would do all that was required of it. It had been in use for eight or nine years on board this vessel, and

(1) 10 P. D. 99.

C. A. 1892

THE MERCHANT PRINCE.

nothing had gone wrong with it. As regards the newness of part of the chain, it is well known that the life of a chain is not more than a year and a half, and spare chain is carried on account of the wear and tear. It cannot be asserted that the servants of the defendants knew that there might be an amount of slackening likely to jam the machinery, and it is in evidence that they were careful in its use, as they tightened it up as occasion seemed to require. If there had been any of the suggested kinks or bends in the chain causing jamming, there would have been marks on the links; but the whole chain was carefully examined after the accident, and no such marks could be found. The most perfect machine will at times, without any assignable reason, fail to act.

LORD ESHER, M.R. In this case the ship under way, which is a steamship, has come into collision with a ship which was at anchor. The ship which was at anchor sues the one which was under way, and which came into collision with her, in the Admiralty Court. The circumstances of the collision depend a good deal upon the place where it occurred. That place was in the Mersey. They also depend upon the time at which it occurred, and what was happening in the Mersey. Anybody who knows the Mersey will appreciate what it means when there is a westerly wind, rather north-westerly I should say from what occurred, and blowing nearly a gale. It means that you are in the Mersey, that there are likely to be a great many ships in the river, and that they are likely to be brought up at different parts of the Mersey, and that they are as nearly as possible what is called wind-rode—that is to say, they would be lying across the river just as this ship was. Then the steamship gets under way on such a morning as that to go down the Mersey. She was up above Liverpool, as I understand it. She had to go down the Mersey to go to sea, and she knows what the morning is, what the Mersey is, and what the wind and the stream are, and that in all probability there will be a great many ships in the Mersey on such a morning as that, and that they will be at anchor. Now, what had happened to this ship before? What was her state when she started? She had come out of the Brunswick

C. A. 1892

THE MERCHANT PRINCE.

Lord Esher, M.R.

Dock the day before. She had machinery for steering, which has been described to us. A very important part of it is the chain for working it. The chain goes over a cog-wheel, and then, in order to take it to the stern of the ship, to turn the rudder, it goes round a leading wheel, one on each side of the ship. There is another part of the machinery which enables the helmsman to steer, not with the large wheel, but with the small wheel. But the ship had two other modes of steering. There was a wheel underneath the bridge, as I understand it. I care not whether it was joined on to this other steering or not, though in fact it must be. Then she had also a steering wheel aft, an ordinary mode of steering, which would be joined to the chains which join to the rudder. She had these three modes of steering herself on such a morning as that. The one which will work quickest is the more complicated, the patent one. There is no doubt about that, and that if you can keep that mode of steerage in order it is the most capable of the three. In a river like the Mersey it would be the best. But the chains, which are a very important part of that machinery, wear out—they want renewing. Then there is another thing which is known to all sailors, that if you put new chains in, they at first stretch. This chain goes over a cog-wheel, as I say, and then round the leading wheels. It must be clear to everybody that you must not make that chain quite tight, or it will not work; neither will it work if you make it too loose. Therefore it must be known to all skilled seamen who have to deal with such matters that you must not make it quite tight, and must not make it too loose. But then there is another thing which any man who thinks about it will see directly. If the chain is quite tight, the links of the chain cannot kink. That is impossible. If you make it just as loose as these chains ought to be when they are in perfect order, then you do not make them so loose as to cause the links to kink; but if you make it too loose, or leave the chain loose and at the same time move it, then every body must know that it is not an unlikely thing that the links will kink. Do that with your watch chain, and in a moment you will see the whole thing. It does not require experts to tell us so much as that. That being the case, therefore, it would occur to any one who

C. A. 1892

THE MERCHANT PRINCE.

Lord Esher, M.R.

thought out this matter, that if the chain remains too tight, if I have screwed it up too tight, it will not work; if I give it only the right amount of loosening it will work, but if I let it be too loose it will not work so quickly as it otherwise would, and secondly the links may kink. That being the state of things, was there a new chain here? Yes, there was. Then the master and officers of that ship would know, or ought to have known, before they left Brunswick Dock that the links of the chain would probably stretch, not if they are left alone, but when they are used. Going out from the Brunswick Dock to the place where they anchored before they started on this morning, that which they ought to have expected to happen did happen—that is to say, the links of the chain did stretch. I care not how much they stretched. They did stretch, and the officers of the ship by their conduct shewed that they knew the stretching ought not to be allowed to remain, because they tightened the chain up. Still, they knew that the chain was a new one, and that all the use they had made of it was to go from the dock up to where they anchored. When they started the next morning, if they had thought the case out, what would have struck them? They would have said: "It is true we have tightened it up now, but it is liable to stretch, and it may stretch going down the river, and, if it does so on such a morning as this, it will be awkward." I dare say they never thought about the kinking of the chain, though they knew that if it was too loose it would not enable them to steer with the celerity and quickness they wanted in going down the Mersey. What might they have done if that had struck them, and if they had thought it out? They might have said: "We will watch that chain, and if at any moment it stretches, so as to seem too loose, we will immediately stop the ship if necessary, and screw it up." But that is not all. It is said that they cannot use the wheel under the bridge without disconnecting it from the other. Very well then, if they cannot, why do not they disconnect it and go down the Mersey with that wheel? They need not have used the other wheel at all, but might have waited till they could use it outside the Mersey, so that the chain would get its full stretch and be safe. They might have had a man underneath to disconnect the wheel at

C. A. 1892

THE MERCHANT PRINCE.

Lord Esher, M.R.

any moment if they saw the chain getting too loose. But then there was the steering wheel aft. Why did they not have a man there, so that if anything happened, in a moment he could steer the ship? That is not done. It is said that ordinary sailors would not think of that duty; but these sailors who, I have no doubt, were expert and good sailors might have thought that there were means of taking the ship out to sea without danger that morning. What is the position of things? She has run into a ship at anchor, and she herself was under way. It is said that we are going to change the whole law by what I am about to say; but has it not been laid down by this Court that where a ship is under way, and she runs into a ship at anchor, that is primâ facie evidence of negligence on her part; that the ship at anchor has only to state the fact, and that it was daylight, or, if it was night, "I had my light up." That is all she has to say; and the mere fact of running into her is evidence of negligence on the other side. Why is that? Because after long experience the Courts have come to this conclusion, that as a matter of truth and fact the one ship ought to be under perfect command, and therefore able to get out of the way of the other ship if she sees her, and the other is a helpless thing which cannot do anything. The law is laid down from the palpable truth of the circumstances of such a case. The great object of the judges in Admiralty cases has been to lay down a plain rule to govern the acts of sailors, and not to have niceties of argument about what they are to do; and the plain rule which they have laid down is this: Unless you can get rid of it, it is negligence proved against you that you have run into a ship at anchor. Then they have gone on with some variation of phraseology, but I am bound to say that if you look into all the cases with an agreement of fact, that the only way for a man to get rid of that which circumstances prove against him as negligence is to shew that it occurred by an accident which was inevitable by him—that is an accident the cause of which was such that he could not by any act of his have avoided its result. He can only get rid of that proof against him by shewing inevitable accident, that is by shewing that the cause of the collision was a cause not produced by him, but a cause the result of which he could not

C. A. 1892

THE MERCHANT PRINCE.

Lord Esher, M.R.

avoid. Inevitable means unavoidable. Unavoidable means unavoidable by him. That being so, there comes the proposition which Lopes, L.J., has put into form that a man has got to shew that the cause of the accident was a cause the result of which he could not avoid. If he cannot tell you what the cause is, how can he tell you that the cause was one the result of which he could not avoid? That appears to me to be perfect reasoning. But when he comes to shew the circumstances of the case, he cannot shew, he says, the cause which puts him in a great difficulty, when he shews circumstances under which the Court can see a cause—I do not say see it clearly proved, but see a probable cause, and see with the evidence which he gives that, if that was a probable cause, there were means by which he could have avoided it. Then not only does he not satisfy the burden which is put upon him, but he lets you into the view of things which shews you a probable cause, and shews you that if that was the probable cause the means by which he could without difficulty have avoided it. What was the cause, the probable cause? I do not say it is proved. Is there a probable cause? Yes. This chain refused to act. That must have been the reason that they could not turn the wheel. It refused to act for a moment, and yet got right immediately after. If two of the links did kink as they went round the leading wheel, one can see for one's self, directly you try the thing what might happen. The gentlemen who advise us say that that is probably the way in which this happened, and they go further and say that it in all probability was the cause of this collision. If that was the case, how came it to happen? Why because the chain became too loose. That opens out what I said at first. If that is so, is not that stretching of the chain a thing which they could have foreseen, which they ought to have foreseen, and which if they had foreseen—not that it would do it but that it might do it—ought not they to have taken means on that morning to have had the other steerages ready to act in a moment, even if they ought not to have used those other steerages, and those other steerages alone? It seems to me in this case, from what one can see of the facts proved of the conduct of the ship here, to shew a probable cause, and if that was the cause it could have been avoided. Here the de-

fendants either have not shewn any cause, and then they cannot have shewn a cause the result of which was one that they could not avoid, or they have shewn a probable cause, which, if it was the real cause, which seems most likely, was one the effects of which they could have avoided. I am of opinion therefore that we must disagree with the judge of the Admiralty Court, and hold that the defendants have not satisfied the burden of proof which lay upon them.

FRY, L.J. I also find myself unable to agree with the decision of the learned judge. It is a case in which a ship in motion has run into a ship at anchor. The law appertaining to that class of case appears to be clear. In the case of *The Annot Lyle* (1) it was laid down by Lord Herschell that in such a case the cause of the collision might be an inevitable accident, but unless the defendants proved this they are liable for damages. The burden rests on the defendants to shew inevitable accident. To sustain that the defendants must do one or other of two things. They must either shew what was the cause of the accident, and shew that the result of that cause was inevitable; or they must shew all the possible causes, one or other of which produced the effect, and must further shew with regard to every one of these possible causes that the result could not have been avoided. Unless they do one or other of these two things, it does not appear to me that they have shewn inevitable accident. In the present case the defendants have not shewn what was the cause. They have left that entirely undecided. In fact, their evidence has been largely given to shew that the event never did happen; but, unfortunately for them, it did happen. Nor have they enumerated all the causes which might have produced the effect, and shewn that they were inevitable. In fact, it is impossible, it seems to me on the evidence before us, to enumerate what might have been the probable causes of this accident. How can we say? It may be that if we knew the real cause of this accident we should have found some simple piece of negligence on the part of some of the servants of the defendants in not doing something which would have avoided the collision. Therefore,

(1) 11 P. D. 114.

C. A. 1892

THE MERCHANT PRINCE.

Fry, L.J.

on that simple ground, the defendants fail in this case. But I go a step further. An inevitable accident is, according to the law laid down in the case of *The Marpesia* (1), that which cannot be avoided by the exercise of ordinary care and caution and maritime skill. Now, the cause of the present accident probably was one which might have been avoided. It appears to me that there was a new chain known to be likely to stretch, that it had stretched, and that it might easily kink or jam in one of the wheels. It follows from that that there was a danger which any person who had applied his mind to the matter might have avoided by the use of the hand-steering apparatus instead of the steam, because it appears that the one, by the suddenness of its action, strains the chain, whereas the other does not. If that was the state of things, it ought to have been avoided. I therefore feel myself unable to agree with the learned judge.

LOPES, L.J. In this case the moving vessel runs into and comes into collision with a vessel at anchor, and I do not think Mr. Myburgh need be afraid that we propose to alter the law with respect to a matter of this kind. As I understand it, the law is perfectly clear that in the circumstances such as I have described the defendants are bound to shew that what happened was inevitable. In this case it is beyond dispute that the defendants are unable to tell what the cause of the accident was, or how or why it happened. It occurs to me that that being so, it cannot be said that they have discharged the burden fastened upon them by shewing that what happened was inevitable. Can they say that they could not avoid a thing when they did not know what the thing to be avoided was? I think not. In this case the steerage gear absolutely failed. How is that to be accounted for? It appears to me it can only be accounted for in two ways. It must have arisen from a defect in the machinery, or from bad management of the machinery. The defendants have not satisfied me that what happened did not proceed from the kinking of the chain. I rather think it did proceed from that cause. If that is so, how does the matter stand with regard to the defendants? They knew they had a new chain, and they

(1) Law Rep. 4 P. C. 212.

ought to have known a new chain was liable to stretch. They ought to have known that a chain that stretched was liable to kink. Knowing these matters, they ought to have provided against that which happened by being prepared to use one or other of the modes of steerage with which they were supplied. In these circumstances, I am unable to see that what happened was inevitable; I am unable to agree with the learned judge below, and I think the appeal ought to be allowed and judgment given in favour of the plaintiffs.

Appeal allowed, judgment reversed, and entered for plaintiffs, with costs here and below. Damages referred to the Liverpool Registrar.

Solicitors for the appellants, the owners of the *Catalonia*: *Hill, Dickinson, Dickinson & Hill, Liverpool.*

Solicitors for the respondents, the owners of the *Merchant Prince*: *Bateson, Warr & Bateson, Liverpool.*

T. L. M.

[IN THE COURT OF APPEAL.]

THE P. CALAND.

Admiralty—Collision—"Not under command"—Sea Collision Rules, art. 5, *sub-ss.* (*a*), (*c*), (*d*).

By art. 5 of the Regulations for Preventing Collisions at Sea, sub-s. (*a*), a steamship "which from any accident is not under command, shall at night carry," in place of the white light, "three red lights in globular lanterns." By sub-s. (*c*), such a steamship "when making way" shall carry the side lights. By sub-s. (*d*), the lights so "required to be shewn . . . . are to be taken by other ships as signals that the ship showing them is not under command, and cannot therefore get out of the way."

Owing to an accident to her machinery, the speed of a steamship was reduced from eleven knots to three or four knots; but at that speed she retained her power of steering, though she might not be able to reverse as quickly as before. She hoisted three red lights in place of the white light, and the red side light was not exhibited till the moment of collision with another vessel:—

Held, by the Court of Appeal (affirming the decision of Jeune, J. [1891] P. 313), that as the vessel could be steered, and move ahead through the water, or stop, or go astern, though not as quickly as before the accident to her

C. A. 1892

THE P. CALAND.

machinery, she was still under command, for she was not unable to "get out of the way." The exhibition of the three red lights was, therefore, misleading and, together with the absence of the red side light, brought about the disaster.

APPEAL by defendants, the owners of the steamship *P. Caland* and freight, against a decision of Jeune, J., finding that vessel alone to blame in a collision with the steamship *Glamorgan*, owned by the plaintiffs.

The case is fully reported in the Court below. (1) The main contention of the parties was as to the meaning of the words "not under command" in art. 5 of the Regulations for Preventing Collisions at Sea. (2)

The facts were shortly that—

On April 15, 1891, about 8 P.M., the Dutch screw steamship *P. Caland*, belonging to the appellants, passed the Varne Light in the English Channel, on the starboard hand, at a distance of about one and a half miles. She was on a N.E. b. E. magnetic course, making about eleven knots an hour. About 8.15 a nut in the slide of the valve of the high-pressure cylinder worked loose. The engineer communicated this fact to the master, and expressed his anxiety to stop the engines for the purpose of repairing the mischief. The master however, on account of his proximity to the Varne shoal, thought that this would not be safe, and desired the engineer to try and go on. Accordingly the valve to the high-pressure cylinder was worked by hand, and later the valve to the low-pressure cylinder was also so worked, with the result that about twenty revolutions per minute were got out of the engines (fifty-six being the full amount), and a speed of three to four knots attained. At the same time the anchor was got

(1) [1891] P. 313.

(2) Regulations for Preventing Collisions at Sea. Art. 5:

(*a.*) "A steamship . . . which from any accident is not under command, shall at night carry, in the same position as the white light which steamships are required to carry, and . . . in place of that light, three red lights in globular lanterns, each not less than ten inches in diameter, in a vertical line, one over the other, not less than three feet apart, and of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least two miles . . ."

(*c.*) "The ships referred to in this article . . . when making way shall carry" the side lights.

(*d.*) "The lights . . . required to be shewn by this article are to be taken by other ships as signals that the ship showing them is not under command, and cannot therefore get out of the way."

ready, the masthead light taken down, three red lights, indicating a vessel "not under command," were substituted for it, and (it was alleged by the master, second officer, and two other witnesses that) the side lights were, in accordance with the regulations, kept in their places to indicate that the vessel was making way. About 8.30 P.M. the white light of a steamer, which proved to be the *Glamorgan*, was seen about three miles distant and half a point on the port bow. Shortly after the red light was made out on about the same bearing, and the lights gradually broadened to some three points, when a collision was rendered imminent by the *Glamorgan* opening her green and shutting in her red light, apparently under a starboard helm. A long blast was blown by the *P. Caland* on the steam whistle, and the engines were ordered astern; but they could not be promptly worked in that direction, and the two vessels came into collision with such violence that the stem of the *P. Caland* was torn away on striking the starboard side, abaft the bridge of the *Glamorgan*, and when the vessels cleared, after being locked together for more than an hour, the *Glamorgan* sank.

The case of the respondents (plaintiffs) was that the *Glamorgan* was heading S.W. b. W. ½ W. magnetic, going about nine and a half knots an hour, when those on board observed an unsteady white light about one point on the starboard bow, and one and three-quarters to two miles distant. Shortly after, three red lights in a vertical line were seen, apparently on the same vessel, and the white light disappeared. The engines of the *Glamorgan* were thereupon eased down to slow and her helm starboarded; but when the three red lights bore about five points on the starboard bow, the loom of the other vessel, which proved to be the *P. Caland*, came into view about 200 yards distant, and her red side light was seen indicating risk of collision. The helm of the *Glamorgan* was put hard-a-starboard, two short blasts sounded on her whistle, and orders given to the engineer to go full speed ahead, but the collision occurred.

Jeune, J., found the *P. Caland* alone to blame, on the ground that the exhibition of the three vertical lights and the absence, until just before the collision, of the red side light, misled the *Glamorgan* into believing that the *P. Caland* was stationary.

C. A. 1892

THE P. CALAND.

As to the hoisting of the three red lights by the *P. Caland*, the learned judge in the course of his judgment said: "All that in this case appears to me to have been the fact is that the vessel was not able to exercise her full rate of speed, and probably not able to reverse as quickly as before; but still she had not so completely lost her power of motion or of reversing, and not at all her power of turning by means of her helm; so that one can say she was not under command. So that my judgment is, with regard to a vessel in the circumstances which I find to have existed here, that the vessel was still under command, and therefore that she was wrong in hoisting the three red lights—a view in which the Trinity Masters coincide." As to the red side light, the learned judge said: "That light was not seen (by the *Glamorgan*) because, for some reason or other, it was not there to be seen. I say 'for some reason or other' because I am not bound to say, and I feel difficulty in saying, the exact cause which for the time may have prevented the light from being seen. I cannot conceal from myself that there is a very great probability—to say no more than that—that the light on the *P. Caland* was turned in for a time. I know they say it was not so; but there is a strong probability that it was. The vessel, beyond all question, hoisted her three red lights; beyond all question she meant to come to an anchor at a very early time; and I cannot help thinking that it is extremely probable that, when she hoisted her three red lights, she meant to come to an anchor, and did that which she ought to have done when she did come to an anchor, namely, bring her red light in."

On appeal,

Barnes, Q.C., F. W. Raikes, and *A. Pritchard*, for the appellants (defendants), the owners of the *P. Caland*. The case turns on the construction to be put upon art. 5, sub-ss. (*a*), (*c*) (*d*) of the Regulations for Preventing Collisions at Sea. There are no cases to help the Court to the true construction of the article, as in the case of *The Buckhurst* (1) the finding of fact that the absence of the three red lights could not have contributed to the

(1) 6 P. D. 152.

collision lessens the importance of the decision; but the appellants submit that the learned judge in the Court below was wrong in holding that the *P. Caland* was not justified in hoisting the three red lights. The accident to her machinery had crippled her in such a way that she could not maintain a speed of above three or four knots. She might be unable to maintain even that speed, and perhaps at any moment be compelled to stop altogether. Under ordinary circumstances this vessel can reverse in three or four seconds; but it took nearly a minute to do so on this occasion. In such a condition she could not be said to be under command, and the master therefore substituted three red lights for the ordinary white masthead light. The anchor was got ready, because the engines might stop altogether, and also for the purpose of stopping to repair the mischief to the engines when a sufficient offing from the Varne shoal had been obtained.

On seeing the three red lights, it became the duty of the *Glamorgan* to keep away from the *P. Caland*; but, instead of that, she was guilty of negligence in coming so near to the *P. Caland*. The evidence is clear that the red side light was in position, and would be visible to the *Glamorgan*, and that vessel brought about the collision by starboarding right across the bows of the *P. Caland*.

Sir Walter Phillimore, and *Holman*, for the respondents, the owners of the *Glamorgan*, were not called upon.

LORD ESHER, M.R. The only question of general importance in this case is the construction of the rule, and the question upon that construction is, When can it be said within the meaning of the rule that a ship is not under command? Construing the rule as it ought to be construed, was this ship in a position where she was not under command? Now a ship may be in one way not under command although her steerage, not her steering, is in perfect order. For instance, the rudder may be perfectly right, or the apparatus which is to turn the rudder may be perfectly right. The wheel may be capable of acting perfectly rightly; but it is of no use if she cannot go ahead owing to something happening to her engines, and if she can only float with the tide. It is no use her having all her steerage apparatus

C. A. 1892

THE P. CALAND.

Lord Esher, M.R.

in order, because it will not steer her. You cannot steer a ship which is a mere floating log. She must be going through the water for her steering apparatus to have any effect. Therefore, a ship might not be under command though her steering apparatus is in perfect order if her engines break down so that they can have no effect upon her, and if she is a steamer without any sails. Then she is not under command, for she can only float with the tide. But if the steerage apparatus is in order, and if the vessel can go ahead through the water, then the steerage apparatus will have its effect upon her, though it may not have that effect so quickly as if she were going fast through the water. It is proved that this vessel could go ahead, and that her steerage apparatus was in order. She could go to starboard, or to port, or astern. But she could not perform these manœuvres so quickly as if her engines were in order. Mr. Barnes says that is true; but I think his argument comes to this, that there was risk that at any moment her engines might cease working, and then she would be brought to a stop and her steerage apparatus could not act upon it, and so she would be not under command. He says that the reasonable apprehension of that happening in a moment is the same as if it had happened for the purpose of this statute. That raises a question. Now, looking at the words of the statute—the first part of the clause which speaks of her not being under command, and the second of her not being under command so that she can keep out of the way—taking these two together, it seems to me that the real construction of the rule is that she must be in such a position that she is not under command in this sense, that she cannot keep out of the way of another vessel coming near her. If she can be steered and if she can be stopped and can go ahead, which is necessary in order that she may be steered, then she is under command, and the apprehension of her being likely, however well founded, in a few moments to be out of command does not shew that she is out of command at the moment spoken of. This vessel, therefore, up to the moment of this collision was not a vessel not under command at the time, although she put up the three red lights to shew that she was a vessel not under command. She was a vessel under command, and, therefore, the

three red lights ought not to have been put up at all. It is quite obvious that a vessel may be, according to this rule, not under command, though she is going ahead. That might be if her steerage is out of order. If a vessel could go ahead, but her steerage was so much out of order that she could not be steered, then she would be going ahead; but, nevertheless, she would be not under command. There must be cases where it would be right to say as a matter of nautical knowledge that she was not under command, though she might be going ahead. The rules provide for that, and say that she must put up three red lights, but must keep her side lights to intimate that she is going ahead; but she could not be going ahead very fast under these circumstances. But where she can go both ahead and astern and steer, all three together, it is impossible, to my mind, to say that she is not a vessel under command. She is under command, and therefore is not a vessel not under command. I think, therefore, it is obvious that the defendants' vessel was in the wrong for putting up these lights. It was very likely to mislead the other ship, because the mere fact of putting the three lights up would shew that she was a vessel not under command, and would not shew that she was going ahead. In the circumstances of this collision, as it took place, I think it is plainly shewn that the one vessel was coming down Channel and the other up, and that at one time they were as nearly as possible going on opposite courses, but that the *Glamorgan* got, as she went on, on the port side of the *P. Caland*. If the red light of the *P. Caland* was exhibited, then she ought to have known that the vessel was a crippled vessel, but was going ahead. I think the *Glamorgan* got very far down before she made up her mind to go ahead of this other vessel, and if that red light had been exhibited I should have thought as a matter of seamanship she ought not to have gone ahead of that ship. She ought to have found that that vessel was going ahead. As it was, she made up her mind to go ahead of her when she was too close to do it. If she had done that it would have been bad seamanship, and she would have been to blame as well as the other; but if that red light was not exhibited, and if it were turned in, then she would have the right to suppose that this vessel shewing the red lights, and

C. A. 1892

THE P. CALAND.

Lord Esher, M.R.

with her side lights taken in, was out of command, and out of command as much as this, that she was not going ahead. If that was so, then the vessel approaching her has a right to treat her as being in that position. She is bound to get out of the way I should think; but she can do it in whatever way she pleases, by going ahead or astern—anything short of actually bad seamanship. If she had a right to suppose that the ship was stationary, then we have the opinion of the gentlemen who assist us, which coincides with the opinion of the assessors below, that she might easily have gone ahead of her without coming into collision. Can her doing that be accounted for? To my mind it can. She said she thought the ship might want assistance, and therefore wished to get to her to see if she wanted assistance. Look how natural it was for her to think so, for when the captain of the *P. Caland* saw her coming as she did, he thought it was a tug coming to offer assistance. That speaks for itself. One might have thought she did want assistance, and the other comes to the conclusion that she is wanting assistance. It is clear to anybody who understands that part of the Channel that she was near the sands, and, in fact, would have been in danger unless she had anchored. Therefore the whole of this case depends upon whether we can overrule the learned judge on the fact he has found, namely, that that red light was not shewn at the time when the other vessel made up her mind to cross. There is evidence of the strongest kind on the part of the *P. Caland* that the red light was then in its proper place, and I am certain that the master of the vessel was not intending to tell an untruth, nor do I suppose that the second mate was. It is not necessary to suppose that either of them, being respectable men and good sailors, intended that; but then it is obvious that those on board the *Glamorgan* were not careless and were looking out. They saw a minute operation which took place on board that ship. They were not careless or omitting to look out. Then it is reduced to a question of probabilities. Is it probable that these people who were looking out, and who, unless they are saying that which is absolutely false, were intending to go to the ship to see whether she wanted help—is it probable that if the red light was shewn they would not have seen it? Why, it is wholly

improbable. What do you find on the other side? Is it or is it not improbable that when these red lights were run up somebody prepared to take the red light in, or did actually take it in? Is that improbable? If they thought that their ship the next moment, or almost immediately after, would come to a standstill, their proper manœuvre when she did was to bring the red light in. If she was going to anchor, the moment she did anchor it would be right to bring that red light in, because the side lights ought not to be visible from any point of view at the same time as the anchor light. It would not be at all improbable that somebody would bring that red light in, and it is perfectly consistent with the truthfulness of the captain and his officer that that did happen. So you have probability on the one side to this extent only, that it seems improbable, and on the other side that which seems to be rather in favour of the light not being exhibited. The learned judge has balanced these probabilities. He has seen the witnesses. I do not think much of that in this case, because, as far as appearances went, he does not suggest that they were telling that which was untrue. He has balanced the probabilities with regard to this question of fact, and has come to the conclusion that the probability of that light being taken in prevails. I cannot say that I think he was wrong, and that is what I must say in order to overrule him on that question of fact. If he was not wrong, then it follows that the one ship with regard to her disobedience of this rule was in the wrong, and that the other ship, according to the advice we have received, had a right to suppose that the ship was stationary, and did not do anything wrong in attempting to cross the bows of the ship as she did, and that the collision would not have taken place except that, contrary to her expectation, the ship, instead of being stationary, was going ahead. That makes the judgment of the judge of the Admiralty Court right—that the one who broke the rule was in the wrong, and that the other, misled by the breaking of the rule, did nothing wrong; so that the ship that broke the rule was solely to blame.

FRY, L.J. The most material question in the case is the construction of art. 5 of the Regulations for Preventing Collisions

C. A. 1892

THE P. CALAND.

Fry, L.J.

at Sea. That deals with the case of a steamship or a sailing ship which from any accident is not under command. From the rule itself we learn something of the meaning of the expression "not under command." We find, in the first place, it refers to vessels which are making way through the water and also to those not making way. Therefore, it is plain that the mere fact of making way through the water does not decide the question one way or the other. But we find in the latter part of the rule that a vessel not under command is said therefore to be "unable to get out of the way." It follows that the meaning of the words "not under command" in that connection is "unable to get out of the way." In the present case the *P. Caland* was able to move through the water. She could steer, she could stop, she could reverse. It is quite true she could not perform all these operations, probably none of them, with the rapidity which she could if her engines had been in perfect condition; but still she was able to perform all these things. It follows, in my judgment, that she was in a condition which enabled her to get out of the way, and, if she could do that, it cannot be said that she was not under command. We are asked to hold that the words "not under command" mean "is likely to be not under command." I do not think we can hold that. The question is not the expectation of being out of command, but the present condition in which the vessel is. That being so, we have to consider the question of fact in this case. I have nothing to add on that to what the Master of the Rolls has said. I cannot bring myself to say that I differ from the learned judge. I think most probably the explanation is that the *P. Caland* did bring in her lights, and that she was therefore taken by the *Glamorgan* to be a vessel which was not moving through the water, and that she approached her and found her actually moving through the water.

LOPES, L.J. I have only one word to add with regard to this rule, which is a matter of importance. Having regard to the form of the rule, I am of opinion that if a steamship can go ahead and reverse and her steerage is unaffected she is not a ship not under command within the meaning of the 5th article of the

C. A. 1892

THE P. CALAND.

Lopes, L.J.

Regulations for Preventing Collisions at Sea. In such circumstances the ship can get out of the way, and is under command. I think that is the correct construction of the rule, and practically in point of fact it is the construction which has been put upon it by the learned judge. With regard to the facts I have nothing to add. The appeal, therefore, will be dismissed.

Appeal dismissed.

Solicitors for appellants, the owners of the *P. Caland: Pritchard & Sons.*

Solicitors for respondents, the owners of the *Glamorgan: Thomas Cooper & Co.*

T. L. M.

[IN THE COURT OF APPEAL.]

C. A. 1892 *April* 4, 5.

THE DUKE OF BUCCLEUCH.

Admiralty — Practice — Parties — Adding or Substituting a Plaintiff after Decree—Rules of Supreme Court, Order XVI., *rr.* 2, 11, 12—*Finality of Judgment.*

By Order XVI., r. 2, of the rules of the Supreme Court: "Where an action has been commenced in the name of the wrong person as plaintiff . . . the Court or a judge may, if satisfied that it has been so commenced through a bonâ fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted . . . as plaintiff upon such terms as may be just." By r. 11: ". . . The Court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a judge to be just, order that the names of any parties improperly joined . . . as plaintiffs . . . be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. No person shall be added as a plaintiff . . . without his own consent in writing . . ."

In an action in personam for damage by collision, the name of the agent, instead of that of the owner of the cargo on board the plaintiffs' vessel, was, by a bonâ fide mistake, inserted in the writ as a co-plaintiff.

The case was carried up to the House of Lords, with the result that the defendants' vessel was found alone to blame, and a decree made in favour of the plaintiffs. The mistake was then discovered, and, to enable the claim of the cargo-owner for damages to be assessed by the registrar and merchants,

C. A.
1892
THE DUKE OF BUCCLEUCH.

Jeune, J., made an order that, on payment of the costs of the application, the name of the owner of the cargo should be substituted for that of the agent as a plaintiff:—

Held, by the Court of Appeal, that a decree in an Admiralty action, fixing the liability, but leaving the damages to be assessed, is not final, and therefore there was power under Order XVI., rr. 2, 11, to make the order, which was affirmed, with the variation that the written consent of the cargo-owner to be added as a plaintiff must be obtained within a limited period.

APPEAL by defendants, the owners of the *Duke of Buccleuch*, from an order of Jeune, J., dated March 29, 1892, substituting, after trial of an action of damage by collision, the name of a plaintiff as cargo-owner.

The action arose out of a collision which took place on March 7, 1889, in the English Channel, between the sailing ship *Vandalia*, belonging to some of the plaintiffs, and the steamship *Duke of Buccleuch*, belonging to the defendants.

The *Vandalia* at the time of the collision was carrying to London, consigned to order, a cargo of 2796 barrels of petroleum, shipped by Meissner Ackerman & Co. of New York, under a charterparty dated January 25, 1889, made between them and the agents of the owners of the *Vandalia*, and bills of lading dated February 1 and 2, 1889.

The question was whether, in an Admiralty action in personam, after judgment in the Admiralty Division, Court of Appeal, and House of Lords, Meissner Ackerman & Co. could, under Order XVI., rr. 2, 11 (1), of the Rules of the Supreme Court, be added as plaintiffs or their name substituted for that of their agent.

(1) Order XVI., r. 2: "Where an action has been commenced in the name of the wrong person as plaintiff . . . the Court or a judge may, if satisfied that it has been so commenced through a bonâ fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted . . . as plaintiff upon such terms as may be just."

Rule 11: ". . . The Court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a judge to be just, order that the names of any parties improperly joined . . . as plaintiffs . . . be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. No person shall be added as a plaintiff . . . without his own consent in writing . . ."

C. A. 1892

THE DUKE OF BUCCLEUCH.

The facts, so far as material, were shortly that:—

On March 12, 1889, a writ of summons in personam was issued in the Admiralty Division, entitled "Between George F. Smith and Others, plaintiffs, and the Eastern Steamship Company, Limited, defendants," and it was indorsed with the following claim: "The plaintiffs, as owners of the ship or vessel *Vandalia*, of the port of St. John's, New Brunswick, the owners of her cargo and her master and crew, claim compensation against the Eastern Steamship Company, Limited, the owners of the steamship *Duke of Buccleuch*, for the loss of the said vessel *Vandalia*, her cargo and crew's effects, occasioned by a collision which took place in the English Channel in the month of March, 1889." The writ was stated to be "issued by Thomas Cooper & Co., of No. 21, Leadenhall Street, in the City of London, solicitors for the said plaintiffs, who reside at New Brunswick and other places."

On March 19, the defendants' solicitors gave the usual undertaking to appear in due course; and on April 16 the statement of claim was delivered by T. Cooper & Co., as the plaintiffs' solicitors. It commenced with an averment in the usual form that "The plaintiffs have suffered damage from a collision which occurred between the sailing-ship or vessel *Vandalia* and the screw steamship *Duke of Buccleuch*, belonging to the defendants," and, after setting out the particulars of the collision, it concluded: "The plaintiffs claim damages for the injuries they have received in consequenee of the said collision," and a reference to the registrar assisted by merchants to ascertain the amount thereof. (1)

(1) By their defence the defendants did "not admit that the steamship *Duke of Buccleuch* was the vessel which collided with the *Vandalia*," and after denying "all and each of the allegations in the statement of claim contained," averred that the *Duke of Buccleuch* landed her pilot at Dover at 4.45 P.M. on March 6, 1889, but had not since been heard of, having been lost with all hands." By their counter-claim the defendants said that, "If it should be proved that the vessel with which the *Vandalia* came into collision was the *Duke of Buccleuch*, the defendants have suffered damage from the loss of the *Duke of Buccleuch* solely caused by the negligent navigation of the *Vandalia* by the plaintiffs or their servants," and the defendants claimed damages against the plaintiffs.

At the trial the learned judge intimated that the defendants could not counter-claim and, at the same time, deny identity. The defendants thereupon admitted that the *Duke of Buccleuch* was the vessel in collision with the *Vandalia*, and amended their

C. A. 1892

THE DUKE OF BUCCLEUCH.

On May 4, the action came on for hearing before Butt, J., and two of the Elder Brethren of the Trinity House as assessors, when the counsel for the defendants objected that the names and addresses of the plaintiffs had not been disclosed, and, therefore, as there was a counter-claim, the defendants would not, in the event of obtaining judgment, be able to shew against whom they had obtained it, so as to be able to enforce it, if necessary, in New Brunswick.

Butt, J., held, that the writ as issued was not a sufficient compliance with the rules under the Judicature Acts, as the names and addresses of all the plaintiffs should be given, or at least the names of all the owners of the vessel must be given, as the owners or master could sue as bailees of the cargo; but the action was allowed to proceed on the solicitors for the owners of the ship undertaking to supply the names of all the plaintiffs.

The names, description, and addresses of the owners of the ship were accordingly furnished, and as owners of cargo the following was given: "Funck, merchant, of Bishopsgate Street, London," and the crew of the ship were described "as per articles, now residing at Wells Street, London, E."

On May 27, pursuant to order, the writ was amended and ran, "Between George F. Smith (fourteen other names), owners of the ship *Vandalia*, Funck, owners of her cargo, and the crew of the said ship *Vandalia*, plaintiffs, and the Eastern Steamship Company, Limited, defendants."

The trial of the action was subsequently adjourned to enable the Trinity masters to inspect the *Vandalia*; and on May 30, Butt, J., gave judgment pronouncing both vessels to blame, the *Duke of Buccleuch* for bad look-out, and the *Vandalia*, under s. 17 of the Merchant Shipping Act, 1873, for an infringement of art. 6 of the Regulations for Preventing Collisions at Sea by a possible obscuration of her red light by the foresail. (1) By the decree the learned judge in the usual form "condemned the owners of the steamship *Duke of Buccleuch* in a moiety of the

---

counter-claim by striking out the first portion of the paragraph so as to begin with the words, "The defendants have suffered damage," &c.

(1) The material parts of the judgment are set out at pp. 87 to 89 of the report of the case in the Court of Appeal, 15 P. D. 86.

plaintiffs' claim for damages, and condemned the owners of the ship *Vandalia* in a moiety of defendants' counter-claim for damages," and referred the assessment of the said damages to the registrar assisted by merchants.

Both plaintiffs and defendants appealed so far as the decree pronounced their respective vessels to blame.

The appeals came on for hearing on December 6 and 7, when the Court of Appeal varied the judgment of the Court below on the ground that the defect in the light of the *Vandalia* could not possibly have contributed to the collision and that, therefore, the *Vandalia* was not to blame. (1) The decree "pronounced the collision in question in this action to have been occasioned solely by the fault or default of the master and crew of the steamship *Duke of Buccleuch*, and for plaintiffs' claim for damages in consequence thereof . . . ."

The owners of the *Duke of Buccleuch* appealed to the House of Lords on the question whether the *Vandalia* was not also to blame, but on June 26, 1891, the decree of the Court of Appeal was affirmed, the House, consisting of four learned Lords, being equally divided. (2)

The owners of the *Vandalia* then brought into the Admiralty Registry their claim for the damages for which they sued, and were paid together with interest and costs.

In July, 1891, in preparing the claim for loss of cargo, the solicitors acting for the underwriters on the cargo in the *Vandalia* ascertained that, though the petroleum was invoiced to Henry Funck & Co., no interest in the cargo had passed to them, as that firm were only holders of the bills of lading as agents for sale. The solicitors thereupon, on July 8, issued a writ in personam against the Eastern Steamship Company, Limited, claiming damages caused through a collision at sea in March, 1889, between the *Duke of Buccleuch* and the *Vandalia*. The plaintiffs were described as Meissner Ackerman & Co., of New York, and the claim was for 5425*l.* 13*s.* 8*d.*, with interest from the date of the collision. An appearance was entered to this writ, and, on July 16, a formal consent to admit their liability for the damages

(1) Reported 15 P. D. 86. *The Duke of Buccleuch*, [1891] A. C.
(2) *Eastern Steamship Co.* v. *Smith.* 310.

C. A. 1892

THE DUKE OF BUCCLEUCH.

was sent to the solicitors of the defendants to be signed on behalf of their clients; but, on July 29, the solicitors of the defendants wrote disputing the liability of the defendants in the action, and claiming their right to defend and go to trial. Thereupon the cargo-owner took out a summons in the original action for an order that the name of Meissner Ackerman & Co. of New York, merchants, should be added as plaintiffs or substituted for Funck, appearing in the proceedings as the owner of the cargo of the vessel *Vandalia*.

On February 24, 1892, this application was refused by the registrar with costs, and, on appeal to the judge in chambers, was adjourned into court.

Kennedy, Q.C., in support of the application, relied upon Order XVI., rr. 2 and 11, of the Rules of the Supreme Court, 1883, as giving the power to add or substitute a plaintiff.

Barnes, Q.C., and *F. Laing*, for the owners of the *Duke of Buccleuch*, referred to rule 12 (1) of Order XVI., and contended that there was no power to grant the application, which was in substance to vary a decree of the Court of Appeal affirmed by the House of Lords and, therefore, now final. The rules dealt with proceedings before trial and were for the purpose of preventing persons who were parties from being defeated by the absence of some other party, but did not allow of new plaintiffs being put on the record after judgment.

The further arguments of counsel sufficiently appear from the judgment of Jeune, J., and all the cases cited for the plaintiffs and defendants are mentioned therein.

Cur. adv. vult.

1892. March 29. JEUNE, J. (after stating the nature of the action and the proceedings which had given rise to the application, continued). It seems to me clear, that if I have power to make this amendment it ought to be made. The owners of the *Duke of Buccleuch* have been in no way prejudiced by the name of

(1) Rules of the Supreme Court, 1883, Order XVI., r. 12: "Any application to add, or strike out, or substitute a plaintiff or defendant, may be made to the Court or a judge at any time before trial by motion or summons, or at the trial of the action in a summary manner."

C. A. 1892

THE DUKE OF BUCCLEUCH.

Jeune, J.

Mr. Funck having been on the record instead of that of Messrs. Ackerman—they do not appear to have cared to be told his full name—and, if it were not that they desired to fight the questions at issue again, they would not be prejudiced by having to pay Messrs. Ackerman in this action instead of being made defendants in another action. But the question is, have I power to make the amendment?

The motion is put by Mr. Kennedy for Messrs. Ackerman & Co. on Order XVI., rr. 2 and 11. Those rules provide as follows:— [The learned judge read these rules and proceeded:—] As I have already intimated, it appears to me that this case satisfies the conditions of rule 2, in that there was a bonâ fide mistake. I will consider presently whether it is necessary for the determination of the real matters in question that the names of the true owners of the cargo should be on the record. I will consider also whether it does not satisfy the condition of rule 11, and whether the presence of the cargo-owner before the Court is not necessary in order to make the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter. But it is said, and this is the real and only point for decision, that in this case final judgment has been given by the House of Lords, and that after that, whether you look at the words "at any stage of the proceedings" in rule 11, or at the language of rule 2, "for the determination of the real matter in dispute," it is now too late to allow the amendment asked for.

Two arguments, but really, I think, converging to one, were presented. It was said that a plaintiff who has a cause of action cannot be substituted for one who has none, and reliance was placed on the decision in *Walcott* v. *Lyons* (1); but it will be observed that in that case the Court of Appeal would apparently have allowed the substitution if the terms they imposed had been acceded to; and in the case of *Long* v. *Crossley* (2), a plaintiff with a right was clearly substituted for a plaintiff with none. Indeed, the provisions of rule 2 making a bonâ fide mistake a condition seem to include and almost to point to the person whose name was erroneously brought forward having no

(1) 29 Ch. D. 584. (2) 13 Ch. D. 388.

C. A. 1892

THE DUKE OF BUCCLEUCH.

Jeune, J.

right in himself. I think, however, that this argument was really put forward only in combination with the argument founded on the proposition that the addition or substitution of a party cannot be made after a final judgment.

No doubt such a proposition is perfectly true. The case of *Attorney General* v. *Corporation of Birmingham* (1) shews, that in the Chancery Division, after the final decree one defendant cannot be substituted for another; and the case of *Keith* v. *Butcher* (2) shews that for this purpose in the Chancery Division final decree means the actual drawing-up and entering of the final decree; and when, as in the case referred to by Mr. Barnes, *Munster* v. *Cox* (3), the question is one of adding, after final judgment, a defendant who had hitherto been no party, for the purpose of getting execution against him, the case is of course even clearer.

But this case is in the Admiralty Division, and what has to be considered is, what do the words "at any stage of the proceedings" in rule 11, or "determination of the matter" in rule 2, mean, when applied to proceedings for collision before that division? The question of real importance in such cases is so clearly what was the conduct of persons on board each ship, or, to put it in another way, which ship is liable to the other ship, her cargo and crew, and the personalities of the owners of the ship and cargo are generally so immaterial till it comes to payment and receipt of the damages, that often, if not usually, in practice the names of the owners of ship and cargo do not appear in the pleadings, and seldom, if ever, is any question of the ownership of ship or cargo raised at the hearing. The result is, that really the only question determined by the decree is the fixing of the liability; the amount of damages and the persons to receive them are questions left to be determined by the registrar and merchants. I think that the fact that the damages remained to be assessed rendered the decree of the judge at the hearing no final judgment. The learned counsel for the *Duke of Buccleuch* relied on the analogy of common law, and said, on the authority of *Chapman* v. *Day* (4), in the Queen's Bench Division,

(1) 15 Ch. D. 423.
(2) 25 Ch. D. 750.
(3) 10 App. Cas. 680.
(4) 48 L. T. (N.S.) 907.

C. A. 1892

THE DUKE OF BUCCLEUCH.

Jeune, J.

that a judgment determining the liability was a final judgment, though the damages remained to be assessed; but I think that the judges in the Court of Appeal, in reversing that judgment (1), intended to express, as they clearly held, a different view, because they followed their judgment in *Phillips* v. *Homfray* (2), a case in the Chancery Division given shortly before, and in the latter case Bowen, L.J., giving the judgment of himself and Cotton, L.J., said (3): "The claim of the plaintiffs is in substance, so far as these inquiries are concerned, an action for trespass. The inquiries, whatever the form of language in which they are directed, are an assessment of damages, and until they have been completed the action is still undetermined." It would appear, therefore, that both in the Queen's Bench and Chancery Divisions a judgment is not to be considered as terminating the action whilst damages remain to be assessed. But in the Admiralty Division the matter does not rest only on assessment of damages. The title of the plaintiffs remains after the decree open to question, and it appears to me that the counsel for the *Duke of Buccleuch* are in the dilemma that if the decree is final Mr. Funck must be regarded as owner of the cargo, or if he is not so to be regarded, the decree is not final.

The practice in the Admiralty Court goes far to shew that a decree at the hearing was never considered final in the sense that a person could not be introduced afterwards as a party to the suit for the purpose of getting assessed and receiving damages. In the case of *The Ilos* (4), where an action was brought, not by the registered owner, but a person having a bill of sale (whether taken after or before the collision does not appear), Dr. Lushington, when the matter was before the registrar and merchants, refused to dismiss the defendant on the ground of want of title in the plaintiff, ordered the reference to proceed, and added, that if there was any doubt who was entitled to receive the amount of compensation, after it had been assessed, he should direct the amount to be paid into the registry, and throw upon the party claiming it the onus of establishing his ownership.

(1) 49 L. T. (N.S.) 436.
(2) 24 Ch. D. 439.
(3) 24 Ch. D. 439, at p. 466.
(4) Sw. 100.

C. A. 1892

THE DUKE OF BUCCLEUCH.

Jeune, J.

In *The Minna* (1), Sir Robert Phillimore approved and followed the case of *The Ilos.* (2)

It is said by Mr. Barnes, that in both these cases the plaintiffs on the record had, or might have had, beneficial rights; but that does not appear to me to meet the point that the Court of Admiralty considered the decree of the judge as leaving still open the question of the title of the plaintiffs as owners of ship or cargo.

Reliance is placed on rule 12, as shewing that no application to add or substitute a party can be made after the trial, an argument which no doubt commended itself to the mind of Field, J., in *Heard* v. *Borgwardt* (3), as supporting the decision in *Attorney General* v. *Corporation of Birmingham* (4), which he was following. But I do not think that rule militates against the view I have expressed. If the word "trial" does not include the reference to the registrar and merchants, as I think it does, then the mode of application is left unprovided for in the case where the trial within the meaning of rule 12 does not terminate every stage of the proceedings within the meaning of rule 11.

The proper order, I think, will be to add Messrs. Ackerman as plaintiffs, as, in this way, any rights the defendants may have against Mr. Funck will be preserved. The costs of this application must be paid by the applicants, and I think they should be paid before Messrs. Ackerman are added (5) as plaintiffs. Costs, other than the costs of this application, will be reserved.

On appeal,

Barnes, Q.C., and *F. Laing*, for the appellants, the owners of the *Duke of Buccleuch*, argued as in the Court below, and, in addition to the cases there cited, referred to the following: *Onslow* v. *Commissioners of Inland Revenue* (6); *Ex parte Chinery* (7); *Salaman* v. *Warner*. (8)

(1) Law Rep. 2 A. & E. 97.
(2) Sw. 100.
(3) W. N. (1883) 173.
(4) 15 Ch. D. 423.
(5) By the order, as drawn up, Messrs. Meissner Ackerman & Co. were *substituted* as plaintiffs for Mr. Funck.
(6) 25 Q. B. D. 465.
(7) 12 Q. B. D. 342.
(8) [1891] 1 Q. B. 734.

Finlay, Q.C., and *Stubbs*, for the respondents, the owners of the cargo in the *Vandalia*, were not called upon.

LORD ESHER, M.R. The whole question, as a matter of law, turns on Order XVI., rr. 2 and 11. The rule which applies to the case is rule 2; but it is necessary to carry into rule 2 the requisites of rule 11. It is obvious that there might be a wrong plaintiff in this matter, because, if Mr. Funck was the consignee of bills of lading, indorsed to him in order that he might act for the owner, he was agent for the owner. The real owner was still the real plaintiff, though the name of his agent was put on the record. It is said that Mr. Funck's name was put on without his authority; but these attempts are all made by two sets of underwriters. The underwriter of the cargo was the real plaintiff. I will assume that the wrong name was put on the record. It was not fraudulent. It was not done with any motive; it was a mistake. The rule said, that if a wrong plaintiff was put on, they might put on the right one. It was within the very words of the two rules. But it is said that a judge cannot do that after the decree fixing the liability. That was an argument against the very words of the rule, which said "at any stage." The decree fixing the liability in the Admiralty Court is not a final judgment. The proceedings are not over. If there were no other judgment to be signed, the proceedings are not over, for the matter has to be sent to the registrar and merchants. I take it that there would be, if necessary, another decree after the registrar and merchants had found what the amount would be. If there was any fuss about it, that would be drawn up in the final order, and then there would be a monition. If they have altered their practice in the Admiralty Court, and issue a fieri facias, that makes it the more strong. It is said that there was no consent in writing on the part of the right plaintiff. The appellants know that the man is the right plaintiff; but it is necessary that his consent in writing should be got. Very well, it shall be got. The order must stand, with the variation that the plaintiffs' consent in writing is to be obtained within six weeks. The appellants will have to pay the costs of the appeal.

C. A. 1892

THE DUKE OF BUCCLEUCH.

FRY, L.J. The words of Order XVI., rr. 2 and 11, are quite ample to justify and require the amendment. I base my decision upon the words "at any stage of the proceedings." It has been argued that the rules do not apply after final judgment. They apply, in my opinion, as long as anything remains to be done in the case. In this case there remains the assessment of damages. In this instance the name of a person has been improperly joined as plaintiff, and the names of other persons are necessary to settle the questions at issue. It is the duty of the Court to add the names of the right plaintiffs.

LOPES, L.J. The case is well within the rule.

Order to stand with variation that plaintiffs' consent in writing be obtained within six weeks. Appellants to pay costs of appeal.

Solicitors for the appellants, the owners of the *Duke of Buccleuch*: *Gellatly & Warton.*

Solicitors for the respondents, the owners of the cargo in the *Vandalia*: *Thomas Cooper & Co.*

T. L. M.

1892

April 5.

LEWIS *v.* LEWIS.

Divorce—Wife's Petition—Decree Nisi—Delay in moving to make the Decree Absolute—Application by Respondent—Power of Court to dismiss the Petition.

In a suit by the wife for dissolution of the marriage, the petitioner obtained a decree nisi, but allowed more than a year to elapse without taking any further step to make such decree absolute:—

Held, on an application by the respondent to make the decree absolute or to dismiss the petition for want of prosecution, that the petition must be dismissed unless within a week the petitioner applied to make the decree absolute.

MOTION by a respondent to make a decree nisi absolute, or in the alternative to dismiss the petition for want of prosecution.

The petitioner, Ellen Lewis, obtained a decree nisi dissolving her marriage with Arthur Percy Lewis on December 8, 1890, and since that time had taken no step to have the decree made absolute. In August, 1891, the respondent wrote to his wife asking for some information or explanation as to her intentions,

1892

LEWIS v. LEWIS.

but received no answer; and on March 15, 1892, a motion was made in this court on his behalf that the petitioner be ordered within one week to apply to make the decree absolute, or that the petition be dismissed.

The petitioner appeared in person; and from the affidavit which she read, it appeared that the respondent, under the will of his father, was entitled to a life interest in the sum of 1500*l.*, which at his death was to be divided among such of his children as he should by any will or testamentary disposition direct or appoint, and the petitioner stated that her objection to making the decree absolute arose from a fear that the respondent might marry again, and exercise the power of appointment in favour of the children of his second marriage to the exclusion of her children.

The motion stood over by direction of the President, that the petitioner might apply if so minded to have the decree nisi converted into a decree for judicial separation. It appeared, however, that the petitioner had made no such application.

J. T. Dixon, renewed the application on behalf of the respondent, that the petitioner be ordered to take the necessary steps for making the decree absolute, or that the petition be dismissed. If the petitioner is allowed to stop short after the decree nisi has been pronounced, the whole object of the Divorce Act will be frustrated, and any petitioner will be enabled to convert a decree nisi for dissolution of marriage into a decree for judicial separation. The Act 23 & 24 Vict. c. 144, in order to give opportunity for the intervention of the Queen's Proctor, divided a decree nisi for dissolution of marriage into two stages; but, as between the parties, the marriage is dissolved from the date of the decree nisi. The decree nisi is the inchoate stage of the divorce, which is completed when the decree is made absolute, and the petitioner has no right to pause between the two stages.

L. Hart, for the petitioner. The Divorce Acts do not enable the Court to compel a petitioner who has obtained a decree nisi to take the necessary steps for making such decree absolute. In the present case, the respondent is entitled to a life interest in a

1892

LEWIS v. LEWIS.

considerable fund, with power of appointment by deed or will among his children, and the petitioner fears that if the decree were made absolute he might marry again and exercise his power of appointment among the children of a second marriage, thus depriving her children of any share in their father's estate. The decree, therefore, ought not to be made absolute until the petitioner has made some provision for his wife and children. The Court has no power to revoke a decree nisi except at the instance of the Queen's Proctor, or of some person intervening for the purpose of shewing collusion. The petitioner cannot move that the decree be rescinded; and as to the respondent, *Ousey* v. *Ousey and Atkinson* (1) is an authority for contending that the Court will refuse to make a decree at the instance of a guilty party. The foundation of this application is an obiter dictum of Lord Hannen in *Ousey* v. *Ousey and Atkinson* (1): "It is not to be assumed as clear that this suit must remain for ever in its present position. By the present law practice and rules, as I construe them, the petitioner in a divorce suit can alone apply to have a decree made absolute. . . . If by not taking it he subjects the respondent to any disadvantage, I can see no reason, as at present advised, why we should not call upon him either to take that step, or to have the decree nisi revoked and the petition dismissed for want of prosecution." But *Lewis* v. *Lewis* (2) is an authority for doubting whether the Court has power to dismiss a petition for dissolution of marriage after a decree nisi has been pronounced at the instance of either of the parties to the suit. The motion to make absolute a decree nisi is not a step in the cause as between the parties; it is a ministerial act performed by the Court itself. As between the parties, the suit is at an end when the decree nisi has been pronounced, and no other step remains which, if not taken, gives the other party a right to complain. In the case of an action in the Queen's Bench Division in which a verdict had been given for the plaintiff, the defendant could not be heard to say that unless the plaintiff proceeded to judgment the verdict should be set aside and the whole proceeding dismissed. But suppose that the plaintiff, having obtained a judgment, refrained from issuing execution, could the defendant

(1) 1 P. D. 56. (2) 2 Sw. & Tr. 394.

1892

LEWIS v. LEWIS.

compel him to do so? Before the Queen's Proctor was allowed to intervene in divorce proceedings, the cause was at an end when the decree was pronounced, and, as Lord Hannen points out in *Ousey* v. *Ousey and Atkinson* (1), the object of the subsequent legislation was not to give respondents greater advantages than they had before, or in any way to alter the position of the parties, but to give time for inquiries. In *Boddington* v. *Boddington* (2) the Court refused to make a decree nisi for nullity of marriage at the instance of the respondent; and in *Latham* v. *Latham and Gethin* (3) it was held that the suit was at an end as between the parties when the decree nisi was pronounced. *Hulse* v. *Hulse and Tavernor* (4) is also an authority for the Court refusing to exercise its power in favour of a guilty party. What is asked here is that the guilty party shall be placed in a better position than he would have been if the decree nisi had never been pronounced, which is what the Court refused to do in that case. If the decree is made absolute, it ought to be on the terms that the respondent should make some provision for his wife and children.

Dixon, was not called on in reply.

JEUNE, J. I might have felt some doubt on this matter if there were not a distinct decision of Lord Hannen, as I think, in point. The question at issue is whether a petitioner who has obtained a decree nisi is entitled, for reasons outside the cause, to keep that decree in its inchoate condition and not to proceed to make it absolute. I do not think that can be done. It is perfectly true that in *Latham* v. *Latham and Gethin* (3), which was heard in the year 1861, it was said that a decree nisi was a termination of the litigation for certain purposes—that is, for the purposes of alimony. Probably that may be so; but it is not a complete termination of the case. The point was considered in *Hulse* v. *Hulse and Tavernor* (4), where the question arose whether adultery committed after the decree nisi could be brought into consideration for the purpose of refusing to make the decree nisi absolute. The Court held that it could, and rescinded the decree nisi.

(1) 1 P. D. 63.
(2) 6 P. D. 13.
(3) 30 L. J. (P. & M.) 163.
(4) Law Rep. 2 P. & D. 259.

1892

LEWIS v. LEWIS.

Jeune, J.

Originally the decree dissolving a marriage was only one decree; but subsequently an Act was passed dividing it into two parts, one of which—the decree nisi—was inchoate until it was completed by the second stage—the decree absolute. That being so, Lord Hannen was justified in saying that the decree nisi is a step in the cause, that until the final step is taken the cause is going on, and a party has as much right to require to have the petition dismissed, or that the cause shall be proceeded with, as he would have with reference to any other step in the cause. All this is a matter of reasoning; but I do not feel inclined to put this case as a mere matter of reasoning when it may be rested on what I regard as a decision of Lord Hannen in the two cases which have been referred to. In *Ousey* v. *Ousey and Atkinson* (1) it was not necessary to decide the point; but it forms so material a consideration in the conclusion to which Lord Hannen arrived, that I cannot regard the expression of his Lordship's opinion as a mere dictum. The case of *Boddington* v. *Boddington* (2) is a distinct authority, because the opinion which his Lordship had originally expressed with some doubt had hardened into a settled conclusion when the second case came before him, and led him to lay down the law without hesitation.

I think, therefore, that I ought to dismiss this petition. It is said that I ought not to exercise my discretion to dismiss this petition if any reason can be shewn why a longer time should be allowed to the petitioner to make up her mind. But it is not suggested that time will help the matter; and the petitioner claims as a matter of right to keep up this inchoate condition of things for ever. I cannot well forget that the President gave the petitioner the option of turning the decree nisi into a decree for a judicial separation, or of making it absolute; and I cannot help thinking that what passed shewed the tendency of the President's mind to be, that if she did not choose one or other of those alternatives the petition ought to be dismissed. Then it is said that I might impose some terms on the respondent. But there is no question of the respondent obtaining a favour on terms. The petitioner is entitled to have the decree absolute; but she asks for much more: she asks that the decree may be accompanied

(1) 1 P. D. 56. (2) 6 P. D. 13.

1892

LEWIS v. LEWIS.

Jeune, J.

by something further, which will prevent its consequences coming about—that is, that the children of any subsequent marriage should not be entitled to a share in their father's estate. I should be willing to give every consideration to the petitioner; but as the matter is put as one of right, I have to decide that, as she refuses to proceed with her petition, and to make absolute the decree nisi which she has obtained, she is liable to have her petition dismissed. I therefore dismiss the petition unless within a week the necessary steps are taken to have the decree made absolute.

Solicitors for the petitioner: *Edward Lee & Davis.*
Solicitor for the respondent: *Staniland.*

W. L.

BAIN *v.* ATTORNEY GENERAL (USHER INTERVENING).

1892

March 8.

Legitimacy, Declaration of—Practice—Intervener condemned in Costs of Petitioner—Refusal to allow Costs of Attorney General—20 & 21 *Vict. c.* 85, *s.* 51—*Legitimacy Declaration Act*, 1858 (21 & 22 *Vict. c.* 93), *ss.* 4, 5, 11.

In a petition under the Legitimacy Declaration Act, the person alleged to be the father of the petitioner was cited, obtained leave to intervene, and became a party to the suit. He gave evidence against the petitioner denying that she was his daughter.

The Court having found all the issues in favour of the petitioner, condemned the intervener in her costs, but refused to give costs to the Attorney General.

APPLICATION for costs.

This was a petition presented under the Legitimacy Declaration Act by Mary Bain, wife of Alexander Bain, of South Shields, in the county of Durham, praying for a decree that she was the legitimate daughter of Ralph and Mary Usher, of Hylton, in the county of Durham.

The petition alleged that Ralph Usher was lawfully married to Mary Usher, then Mary Caizley, spinster, on August 16, 1866; that after the marriage Ralph and Mary Usher lived and cohabited at Hylton; that on November 23, 1866, they had issue of the marriage a daughter, born at 12, Clarence Street, Newcastle-on-Tyne, and that the petitioner was the said daughter.

The Attorney General appeared and traversed all the allegations in the petition, and Ralph Usher, who was cited to see

1892

BAIN v. ATTORNEY GENERAL.

proceedings, obtained leave to intervene, and filed pleas denying the allegations in the petition.

The petition was heard before the President (Sir C. Butt) without a jury, and the intervener, Ralph Usher, gave evidence denying that the petitioner was his daughter. The President, after a hearing which extended over four days, came to the conclusion that the petitioner had made out her case, and pronounced a decree declaring her to be the lawful daughter of Ralph and Mary Usher, between whom a valid marriage had been solemnized on August 16, 1866.

Inderwick, Q.C. (*Gatey*, with him), moved to condemn the intervener in the petitioner's costs. By s. 11 of the Legitimacy Declaration Act of 1858 (21 & 22 Vict. c. 93), that Act and the Divorce Act of 1857 are to be construed as one Act, and, by s. 51 of the Divorce Act of 1857, the Court has power to make such order as to costs as may seem just. By s. 7 of the Legitimacy Declaration Act, the party cited to see proceedings may become a party to the suit, and as such is subject to the discretion of the Court under the 51st section of the Divorce Act.

Gwynne James, for the Attorney General, applied to condemn both the petitioner and the intervener, in the costs of the Attorney General. Up to the present time there has been no fixed principle with regard to the costs of the Attorney General in these cases, which may sometimes be of considerable amount. Up to 1889 the Crown had never made any application for costs, but since that date applications have been made for such costs, which have been granted in some and refused in other cases. In *Brinkley* v. *Attorney General* (1) they were given; but in *Baddeley* v. *Attorney General* (2) they were refused, Lord Hannen in that case saying that the matter was entirely in his discretion. There is no case, however, in which costs have been applied for against a party cited. The objection which may be taken to the application is, that unless there is a special provision in the Act of Parliament to that effect, the Crown cannot receive nor be called upon to pay costs. That is the rule laid down in Blackstone's

(1) 15 P. D. 76. (2) Not reported.

Commentaries, bk. 3, p. 400, 7th ed., and Stephen's Commentaries, vol. 3, p. 693, 11th ed.; and such being the case, it is necessary to look at the Act of Parliament. Sect. 5 of the Legitimacy Declaration Act provides that the Court may if it deem it reasonable award costs to any person cited, whether he oppose the declaration or not; but that provision does not apply to the Crown, and only affects the petitioner. By s. 4 all the provisions of the Act of that session, i.e., of the Divorce Act of 1857, so far as the same may be applicable, are extended to applications under this Act. This section extends the power of the Court under s. 51 of the Divorce Act to cases under the Legitimacy Declaration Act, and although the Crown is not expressly mentioned, the Court has power to award costs to the Crown or to condemn the Crown in costs. *Moore* v. *Smith* (1) is an authority for the proposition that though the Crown is not mentioned, yet if it appears to have been intended to make the Crown liable to costs, the Court may award costs in its favour.

[THE PRESIDENT. That is a precedent of a criminal case where the Crown must be a party—not a proceeding under the Divorce Act, where the Crown is not necessarily a party.]

In legitimacy declaration cases the Attorney General represents the public.

[THE PRESIDENT. There is nothing in the Legitimacy Declaration Act about the costs of the Attorney General.]

But it is incorporated with the Divorce Act, and s. 51 applies. In *Mews* v. *The Queen* (2), the Attorney General was condemned in costs, although it is stated in a note to the case, signed by Lord Blackburn and the Clerk of the Parliaments, that the Attorney General had agreed not to regard the case as a precedent. If s. 51 does not apply, the Court will have no power in regard to costs except that given by s. 5 of the Legitimacy Declaration Act to order the petitioner to pay the costs of the party cited. The words of the 51st section are sufficiently general to enable the Court to give the Crown its costs.

B. Deane, for the intervener. The Court can only award costs in this suit under the Legitimacy Declaration Act, which merely enables the Court to do what it will probably refuse to do here

(1) 28 L. J. (M.C.) 126. (2) 8 App. Cas. 353.

1892

BAIN v. ATTORNEY GENERAL.

—to give the intervener his costs. The 20 & 21 Vict. c. 85, only enables certain parties to be parties to a suit—the petitioner and the persons charged with the commission of adultery; and s. 51 only applies to the costs of these parties. By the 23 & 24 Vict. c. 144, s. 7, the intervention of the Attorney General in divorce suits is introduced for the first time, and specific provision is made for his costs, and the same provision is made in every subsequent Act in which the intervention of the Attorney General is contemplated. There is no mention of the Attorney General's costs in s. 51 of 20 & 21 Vict. c. 85, because at that time his intervention was not contemplated, and no case can be cited in which the parties have been condemned to pay the Attorney General's costs. In this case Usher was cited to appear; he raised the same issues as the Attorney General; the case was conducted entirely by the Attorney General, and it was in fact a controversy between the Crown and the petitioner. There is no provision in the Legitimacy Declaration Act that a person brought before the Court shall be condemned in costs; but s. 5 provides that the Court if it thinks fit may award costs to any person cited.

Inderwick, Q.C., in reply. The rule as to the Crown neither receiving nor paying costs is laid down in *Corporation of London* v. *Attorney General.* (1) The Attorney General is made a party to these legitimacy declaration suits because one of the matters required to be declared is that the petitioner is a British subject. The Act of 1857 gives the Attorney General no right to receive costs—such right where it exists is given specifically by each Act in which the intervention of the Attorney General is contemplated, and the combined effect of s. 11 of the Legitimacy Declaration Act, which says that that Act and the Act of 1857 shall be read as one Act, and of s. 51 of that Act does not extend the powers of the Court to the Attorney General. To condemn the petitioner in the costs of the Crown would be to defeat the whole object of the suit.

THE PRESIDENT. If ever there was a case in which the unsuccessful party should be condemned in costs this is one. It is

(1) 1 H. L. C. 471.

all very well to say that Usher came in because he was cited, and that he left the Attorney General to conduct the case. But in fact Usher got into the witness-box and swore that the petitioner was not his daughter, thereby doing his best to oust his own child from any share in the property of her grandfather. But that is not the question here to-day; what I have to decide is whether I have power to condemn him in costs. The question is not entirely free from doubt. The power, if I possess it, is conferred on this Court by the combined operation of s. 51 of the original Act of 1857 and s. 11 of the Legitimacy Declaration Act of 1858. The words of the 51st section of 20 & 21 Vict. c. 85, run thus: "The Court, on the hearing of any suit, proceeding, or petition under this Act, may make such order as to costs as to such Court may seem just"; and the 11th section of the Legitimacy Declaration Act of 1858 is as follows: "The said Act of the last session" (i.e., the Divorce Act of 1857) "and this Act shall be construed together as one Act."

The question is whether I have power to award costs against the party cited. I agree that some little difficulty or doubt is suggested by the words of the 5th section of the Legitimacy Declaration Act; but the words in the 51st section of the Act of 1857 are general, and are not in terms confined to what may strictly be termed parties cited. But—though not without some doubt—I hold that that section does give this Court discretion to make an order against a party cited, and I shall make an order that Usher pay the petitioner's costs. Then arises the question, assuming that the power exists, whether the Attorney General is entitled to costs either against the party cited or against the petitioner or against both. There is no express mention of the Crown in s. 51 of the Divorce Act of 1857, nor, so far as I understand the matter, was it contemplated at the time of the passing of the Act that the Attorney General should become a party to divorce proceedings. Therefore, when these words were enacted there was no notion of including the Crown in the provisions as to costs. If that be so—there being no express mention of the Crown, and nothing which by implication can apply to the Crown—the ordinary rule prevails that the Crown is not liable to costs, and, not being liable, does not

1892

BAIN v. ATTORNEY GENERAL.

receive them. I therefore shall not give the Crown costs either against the party cited or against the petitioner.

Solicitors for petitioner: *J. E. & H. Scott.*
Solicitor for Attorney General: *Sir A. K. Stephenson.*
Solicitor for intervener: *Hickin & Fox.*

W. L.

1892
March 17.

Followed. WHITE *v.* WHITE [1950] P. 39

HANBURY *v.* HANBURY.

Divorce—Insanity, how far a Defence.

By Sir Charles Butt (President):—Assuming that insanity can in any case afford a defence to proceedings for divorce, it is necessary, in order to make insanity a good plea to a petition for divorce, that the plea should state that the insanity is lasting and abiding, and that there is no hope of recovery or amelioration, and not that it is a mere recurrent or intermittent insanity. And where it appears that a husband who returns to the conjugal home after a period of confinement in an asylum is subject to recurring fits of mania, which, though they may assume the form of hereditary disease, endanger the safety of the wife, she is entitled to the protection of the Court by the grant of a judicial separation:—

Quære, whether insanity can, under any circumstances, afford a defence to a petition for divorce.

THIS was a petition presented by Clara Martha Hanbury, praying for a dissolution of her marriage with Ernest Osgood Hanbury, on the ground of his adultery coupled with cruelty. The respondent, in his answer, in addition to a general traverse, pleaded, in answer to the charges of cruelty and some of the acts of adultery, that they had been condoned by the petitioner by the execution of certain deeds and by subsequent cohabitation, and he further pleaded, in answer to the charges of cruelty and adultery, that if he had committed such acts he was of unsound mind at the time and incapable of understanding the nature of such acts or the legal consequences of them.

The alleged acts of cruelty were all committed before the middle of 1884, and certain acts of adultery before August, 1886, were charged; but it was admitted that these were condoned by subsequent cohabitation, which was continued up to August, 1886.

Other acts of adultery were alleged to have been afterwards

committed at Exeter in 1890 and in 1891; and the substantial issue of fact in the suit was whether these acts revived the previous cruelty and adultery, or whether the respondent was so insane at the time of their commission as not to be responsible for them.

The case was heard before the President (Sir C. Butt) with a special jury.

Inderwick, Q.C. (*B. Deane,* with him), for the petitioner.

Lockwood, Q.C. (with him *Bayford, Q.C.,* and *Witt, Q.C.*), for the respondent.

The medical witnesses examined for the petitioner described these attacks as delirium tremens, produced solely by drink; while other medical men, called on behalf of the respondent, described him as suffering from folie circulaire, an hereditary form of insanity of which an irresistible craving for drink is a symptom and a result, but not a cause.

From the evidence of the witnesses called, it appeared that the parties were married in 1875, and lived happily together till 1881, when the respondent began to drink heavily. From that time forward he was subject to attacks which were variously described as delirium tremens, or recurrent mania coming on suddenly and without notice, during which he was extremely violent and difficult of control, and which led to his confinement from time to time in various asylums or retreats. During the intervals between the attacks he was admitted to be an amiable, well-conducted man.

THE PRESIDENT (SIR C. BUTT) (in charging the jury, after reviewing the facts of the case) said:—The grave and difficult question in this case is whether insanity is a defence to a suit of this kind. Thus broadly stated, so far as I am aware, it has never been decided in this country, and I do not know whether it ever will be, because there is insanity, and insanity. Quite apart from mania produced by drink there might be a case in which insanity would be a defence, and there are other cases in which it might not be. I am far from asserting at this moment that insanity may not be a bar to a suit for dissolution of marriage; but I think

1892

HANBURY v. HANBURY.

The President.

that, in order to make such a plea a good plea, it must be averred that it was a lasting and abiding insanity—something different from recurrent insanity. I do not think it is necessary to give you more direction on that point; I only intimate my view, because the questions which I shall put to you will deal with this matter. I shall not ask you to find general insanity; but I shall ask you simply to find insanity or sanity at particular times. I am not entirely satisfied that a mere plea of insanity is a sufficient answer to a suit. It may be that a person is so insane as to necessitate his or her confinement in an asylum or some other place of permanent detention, and the disease may be such that there is no hope of recovery or amelioration such as will allow of his or her discharge. When a disease of that sort seizes upon a person, and he or she has to be incarcerated or permanently to be placed in confinement, I should hesitate to say that in regard to an act committed in such a state of insanity a plea of insanity might not be an answer. But I think it is very different with regard to intermittent and recurrent insanity. If a man is afflicted with madness or insanity of such a nature as to necessitate keeping him in duress for the rest of his life, there is no danger of violence to his wife. I conceive that the object of the Divorce Act is not so much, or nearly so much, the punishment or retribution for a marital offence as the protection of the party who is in peril. I believe that protection, and not punishment or retribution, is the main object; and if it can be shewn that the insanity is of such a nature that it will produce violence on the part of the husband, and endanger the safety of the wife, though it need not entail the permanent incarceration of the man, but only his restraint from time to time—if the mania is recurrent and comes on suddenly from time to time she may be placed in great jeopardy. In such a case I can well conceive that, although in some instances insanity may be one of those misfortunes which must be taken by a wife with her husband for better or for worse, and though it may assume the form of a disease, yet if it is such as to imperil the wife's safety she is entitled to the protection of this Court. Assuming for a moment that these attacks were not brought on the respondent by his own self-indulgence, assuming that they were the result of hereditary

disease, I should still be disposed to hold that acts of cruelty committed in one of these fits of mania would entitle the wife to the remedy which she asks—separation from her husband. If the mania is intermittent and recurrent, the husband is entitled to go home when he recovers from time to time—the wife cannot refuse him admission to the conjugal home; and if the mania is likely to recur accompanied with violence which would place the wife in peril, the ordinary protection which she is supposed to obtain by proceedings in Lunacy is a delusion, because it does not protect her against the return home of her husband, who is liable at any moment to become a lunatic. The medical testimony, and especially the evidence of Dr. Maudsley, is to the effect that the attacks come on suddenly without notice, and that the patient becomes excited and aggressive, totally incapable of self-restraint and impatient of contradiction; and it is evident, therefore, that the wife's safety may be at any moment jeopardized. [After some further observations on the evidence, the learned judge concluded by putting seven questions to the jury, of which the last three were whether, when the respondent committed the acts of cruelty and adultery charged against him or any of them, he was capable of understanding their nature and consequences; and, lastly, whether he committed those acts, or any and which of them, under mental aberration directly or indirectly caused by drink, or under mental aberration not directly or immediately caused by drink.]

The jury found that the respondent had committed the acts charged against him as cruelty and adultery, and that at the time he committed them he was capable of understanding their nature and consequences; and the President pronounced a decree nisi with costs, giving the custody of the children of the marriage to the petitioner.

Solicitors for petitioner: *Routh, Stacey & Co.*
Solicitors for respondent: *Hanbury, Hutton & Co.*

W. L.

1892
March 29.

WADDELL *v.* WADDELL AND CRAIG.

Divorce—Co-Respondent condemned in Costs—Death of Co-Respondent before Payment of Costs—Petitioner appointed Receiver to his Estate—Order XVII., *r.* 4; *Order* XLII., *r.* 28.

In a petition by a husband for divorce, a decree absolute had been pronounced and the co-respondent condemned in the costs of the petition. An arrangement was subsequently made by which the co-respondent undertook to pay the amount of the costs by instalments; but he died intestate before the whole of such instalments had been paid. Immediately after his death an order was made restraining his widow from dealing with his estate.

The Court, under Order XVII., r. 4, and Order XLII., r. 28, appointed the petitioner receiver of the co-respondent's estate, but directed that the order should not be drawn up for a week, in order that the widow of the co-respondent might decide whether she would take out administration and give security for the debt.

APPLICATION for the appointment of a receiver.

In this case, which was a petition by a husband for divorce, a decree absolute had been pronounced on December 17, 1890, dissolving the marriage and condemning the co-respondent in the costs of the petition. On August 13, 1891, an order was made on the co-respondent for the payment of 199*l.* 4*s.* 5*d.*, taxed costs, which was personally served on him on September 17, 1891. In December, 1891, an arrangement was made by which the co-respondent undertook to pay the sum due in instalments; but in March, 1892, he died intestate, leaving part of the amount due unpaid.

On March 22, Jeune, J., made an order restraining the widow of the co-respondent from dealing with his estate and effects until further order, and also made an order restraining the Cheque Bank, Limited, from parting with any moneys belonging to the co-respondent. The estate of the deceased was stated to be of the value of 70*l.* There was also 21*l.* due to him for arrears of salary.

B. Deane, on behalf of the petitioner, moved that he be appointed receiver of the estate of the deceased, and relied on Order XVII., r. 4, and Order XLII., r. 28.

The widow, no doubt, is entitled to administration, but she

1892

WADDELL v. WADDELL.

can have no interest in the estate, as it will be absorbed by the debt.

Houghton, for the widow. It is doubtful whether such an order can be made by this Court.

[The PRESIDENT. I have all the power of the Chancery Division.]

The widow is willing to take out administration and give security, as there may be assets which will bring up the value of the estate to 500*l.*

The PRESIDENT (SIR C. BUTT). I will appoint the petitioner receiver; but the order will not be drawn up for a week, in order that the widow may decide whether she will take administration and give security for the debt.

Solicitor: *William Easton.*

W. L.

IN THE GOODS OF WILKINSON.

1892

April 5.

Probate—Will—Executor according to the tenor.

A testatrix appointed A. and B. "trustees" of her will, and expressed her wish that they should pay her funeral and other debts:—

Held, that A. and B. were thereby constituted executors according to the tenor, and entitled to probate.

APPLICATION for probate.

Ann Wilkinson, late of No. 12, Abercrombie Street, Battersea, in the county of Surrey, died on January 20, 1892, leaving a will duly executed bearing date March 21, 1890. The will commenced in these terms: "I hereby revoke all wills, codicils, and other testamentary dispositions heretofore made by me, and declare this to be my said will. I appoint Mr. George Torkington and Mr. Eli Wilkinson, hereinafter called my trustees, of this my will." The will, after making various specific bequests, concluded in these words: "It is my wish and desire that my trustees do pay my funeral and all other debts owing by me as soon as possible after my interment. It is also my wish that the residue of my estate is equally divided unto the above said parties."

1892

IN THE GOODS OF WILKINSON.

It appeared from an affidavit of Mr. Torkington that the word "executors" was in the original draft as prepared by him, but that it had been inadvertently omitted from the copy, also prepared by him, and signed by the testatrix.

Searle, moved for a grant of probate to Mr. Torkington and Mr. Wilkinson as executors according to the tenor. *In the Goods of Collett* (1) and *In the Goods of Fry* (2) are authorities for the proposition that a direction in a will that certain persons shall pay the debts of the testator is sufficient to constitute them executors according to the tenor.

JEUNE, J. I think that, according to the true construction of the will, the testatrix intended to appoint these gentlemen her executors, and the grant of probate, therefore, may go to them as executors according to the tenor.

Solicitors: *West, King, Adams & Co.*

W. L.

1892

April 12.

IN THE GOODS OF LADY ISABELLA GORDON.

Probate—Will—Codicil—Mistake in Date of Reference.

A testatrix executed a will in 1887, and a subsequent will in 1889 by which she revoked all previous wills. In 1891 she executed a codicil which by mistake was described as a codicil to the will of 1887:—

Held, that probate might be granted of the codicil, together with the will of 1889, with the reference to the will of 1887 omitted.

APPLICATION for probate.

Lady Isabella Gordon died on January 17, 1892. On March 29, 1887, she made a will of which she appointed Edmund Turner, Catherine Gordon, George H. Hopkinson, and Samuel Bircham executors. On July 9, 1889, she executed another will, which did not in any material respect differ from the former will, except that it made further provision for her only daughter, Miss Catherine Gordon, and it revoked all previous wills. On January 23, 1891, she executed a codicil to her last will and testament, but by mistake this was referred to as "the will of the

(1) Dea. & Sw. 274. (2) 1 Hagg. Ecc. 80.

1892

IN THE GOODS OF LADY ISABELLA GORDON.

29th day of March, 1887," which had been revoked by the will of 1889.

From the affidavit of Mr. Samuel Bircham, a member of the firm of Bircham & Co., the solicitors of the testatrix, it appeared that the custom of the firm was to deposit all their clients' wills in a box known as the "will box," and that the will of March, 1887, had been so deposited. But the testatrix, when she executed the will of 1889, desired that it might be deposited in her private deed box, which was in the custody of her solicitors. When the codicil of 1891 was being prepared in the office, the solicitor's clerk, being directed to ascertain the date of the last will of the testatrix, went to the general will box and took out the will of 1887, and in this way it came about that the last will was wrongly described.

B. Deane, moved, with the consent of all parties, for a grant of probate of the will of July 9, 1889, and of the codicil of January 23, 1891, with the words "29th day of March, 1887," omitted. The will of 1887 was revoked, and the codicil does not shew any intention to revive it. [He referred to *In the Goods of Anderson.* (1)]

JEUNE, J., made the grant with the omission as prayed.

Solicitors: *Bircham & Co.*

(1) 39 L. J. (P. & M.) 55.

W. L.

1892
May 24.

IN THE GOODS OF WALSH.

Probate—Administration—Joint Grant to Next of Kin and Another Person entitled in Distribution — Consent of Persons entitled in Distribution — 20 & 21 Vict. c. 77, s. 73.

A widow died intestate leaving a brother and nine nephews and nieces, the only persons entitled in distribution. Three of her nephews and nieces were in Australia, but, the other six consenting, the Court made a grant of administration to the brother and one of the nephews under 20 & 21 Vict. c. 77, s. 73.

APPLICATION for administration.

Sarah Walsh, deceased, late of Stanford-le-Hope, in the county of Essex, died on October 1, 1891, intestate, a widow, without parent or child surviving. She had two brothers, William Fordham and Thomas Fordham, who predeceased his sister leaving nine children—nephews and nieces—who with William Fordham were the only persons entitled in distribution of the personal estate and effects of the deceased.

Barnard, moved for a joint grant of administration of the estate and effects of the estate of Mrs. Walsh to her brother William Fordham and Charles Alfred Fordham, one of the nephews of the deceased, and cited *In the Goods of Grundy*. (1)

R. H. Pritchard, consented to the grant on behalf of six of the nephews and nieces of the deceased, the other three being absent in Australia.

JEUNE, J. Considering the wide language of the 73rd section, and considering how nearly all the interests involved are represented, I think I am justified in making a grant under the 73rd section of the Court of Probate Act.

Solicitors for applicant: *Walker, Son, & Field.*

Solicitors for the other persons entitled in distribution: *Woodward & Hood.*

(1) 1 P. & D. 459.

W. L.

THE J. R. HINDE.

1892
April 7, 8, 9.

Admiralty—Collision—Thames Rules, r. 20—*Stock Awash.*

By r. 20 of the rules and bye-laws for the regulation of the navigation of the river Thames, allowed by Order in Council, February 5, 1872, "No vessel shall be navigated or lie in the river with its anchor or anchors hanging by the cable perpendicularly from the hawse unless the stock shall be awash . . . . "

In an action of damage for a collision which occurred in the river Thames, it appeared that the anchor of the plaintiffs' vessel was one of the parts which first came in contact with the defendants' vessel. It was hanging from the hawse, shackle, or ring, awash, and the defendants by their counter-claim charged the plaintiffs with neglecting to comply with the rule :—

Held, that the rule had not been infringed, as the anchor must be as low as stock awash, but may be as much lower as is thought proper.

ACTION of damage by collision.

The plaintiffs were the owners of the screw steamship *Refulgent*. The defendants were the owners of the screw steamship *J. R. Hinde*.

The case is reported only as to the meaning to be attached to the words "the stock shall be awash" in rule 20 of the Rules and Bye-laws for the Navigation of the River Thames. (1)

The facts, so far as material, were as follows :—

On March 3, 1892, shortly before 6 P.M., the *Refulgent*—a screw steamship of 619 tons register, and seventeen hands, with a cargo of coals from Jarrow-on-Tyne to London—was proceeding up the Thames a little above the Lower Derrick in Woolwich Reach. The tide was ebb of about the force of one knot, and she was a little south of mid-channel, making about two knots over the ground. She was intending to go to the buoys on the S. side of Bugsby's Reach between the Upper and Lower Derricks, and there make fast, when a steamer, angling across her bows, came into collision with her. This steamer proved to

(1) Rules and Bye-laws for the Regulation of the Navigation of the River Thames allowed by Order in Council, February 5, 1872 :—

Rule 20 : "No vessel shall be navigated or lie in the river with its anchor or anchors hanging by the cable perpendicularly from the hawse, unless the stock shall be awash, except during such time as shall be absolutely necessary for catting or fishing the said anchor or anchors, or during such time as may be absolutely necessary for getting such vessel under way."

1892

THE J. R. HINDE.

be the *J. R. Hinde* of 414 tons register, and a crew of seventeen hands, with a cargo of coals from Briton Ferry to the Upper Derricks, in the Thames. The parts of the vessels which first came in contact were the port bow and anchor of the *Refulgent*, and the starboard side of the *J. R. Hinde*, and it was (inter alia) alleged by those on board the latter vessel that damage was done under water by the anchor of the *Refulgent*, which, according to the defendants' counter-claim, "was being carried in an improper position, and was not stock awash."

The port anchor of the *Refulgent* was, at the time of the collision, hanging from the hawse, shackle, or ring, awash, and it was contended on behalf of the defendants that this was a violation of the rule which requires the anchor to be "stock awash." It was further contended by the defendants that much of the damage would have been avoided if the anchor had been promptly lowered. The plaintiffs denied that there had been any infringement of the rule, as they alleged that its meaning was satisfied by the anchor being below stock awash, and that the damage done could not be avoided, as there was no time to allow of the anchor being further lowered. [The case of *The Orwell* (1) and that of *The Sindbad* (2) were referred to. In the former an opinion was expressed that the anchor may be below stock awash, and in the latter the Court of Appeal intimated that the rule itself required alteration as being practically obsolete.]

Myburgh, Q.C., and *J. P. Aspinall*, for the plaintiffs.
Barnes, Q.C., and *F. Laing*, for the defendants.

JEUNE, J. I think there is no doubt about this case, as regards the question of the *J. R. Hinde* being in fault; and I need not, after what counsel have said, dwell upon the facts which have brought us irresistibly to that conclusion. As regards the *Refulgent*, two things are alleged against her. The first is that she was carrying her anchor, which was suspended either shackle or ring awash, too low. It is contended that the rule which says that the anchor shall be carried stock awash

(1) Adm. Div., May, 1887, not reported. (2) 4 Times L. R. 170.

1892

THE J. R. HINDE.

Jeune, J.

was violated by the *Refulgent*, as the rule means stock awash and nothing else. To my mind that does not seem a sound contention. It appears to me that the anchor must be, according to the rule, as low as stock awash, and may be as much lower as is thought proper. I think the intention of the rule is that stock awash is the minimum. So I hold that the *Refulgent* violated no rule in having the anchor where it was. Then it is said that the *Refulgent* should have lowered her anchor. I agree that if the anchor had been lowered in time the injury might probably have been averted; but the Trinity Masters advise me, that though it would have been a very smart thing to have lowered the anchor when the collision was imminent, it was not a thing that could reasonably be expected to be done under the circumstances. The result is that I find the *J. R. Hinde* alone to blame for this collision.

Solicitor for plaintiffs: *Charles E. Harvey.*
Solicitors for defendants: *Gellatly & Warton.*

T. L. M.

THE ZANZIBAR.

1892

April 13.

Admiralty—Limitation of Liability—Gross Tonnage—Double Bottom for Water Ballast—The Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *s.* 21, *sub-s.* 2—*The Merchant Shipping* (*Tonnage*) *Act*, 1889 (52 & 53 *Vict. c.* 43), *s.* 5.

In an action for limitation of liability, the owner of a ship, which is constructed with a double bottom for water ballast, is entitled—in calculating the gross tonnage upon which his statutory liability in damages is based—to avail himself of the provisions of s. 5 of the Merchant Shipping (Tonnage) Act, 1889, and measure to the upper side of the inner plating of the double bottom, so as to exclude the space between the inner and outer plating.

ACTION for limitation of liability on behalf of the owners of the registered British screw steamship *Zanzibar*.

The facts, so far as material on the question whether the space included in the double bottom of the vessel must be measured when calculating the gross tonnage, were as follows:—

On February 16, 1891, a collision occurred between the plaintiff's steamship *Zanzibar* and the steamship *Venus*, in consequence of which the latter vessel shortly afterwards sank, and,

1892

THE ZANZIBAR.

together with the cargo then laden on board, was totally lost, but there was no loss of life.

On April 1 the owners of the cargo lately laden on board the *Venus* commenced an action against the owners of the *Zanzibar* and freight, for the recovery of damages occasioned by the collision; and on November 20 the Court found the *Zanzibar* solely to blame.

On February 5, 1892, another action was instituted by the owners of the steamship *Venus*; and the owners of the *Zanzibar*, having reason to believe that other claims might be brought against them in respect of matters arising out of or occasioned by the collision, commenced, on March 14, the present action against the owners, master, officers, and crew of the *Venus*, and against the owners of her cargo, and all other persons claiming damages in respect of the collision. By their statement of claim the owners of the *Zanzibar* alleged that the said collision occurred without their actual fault or privity, and sought a stay of all further proceedings upon payment into Court, with interest at 4 per cent. from the date of the collision of the sum of 22,943*l.* 16*s.* 9*d.*, being 8*l.* per ton, calculated under s. 54 of the Merchant Shipping Act Amendment Act, 1862 (1), on 2867·98 tons, the alleged gross tonnage of the vessel without deduction on account of engine room.

The copy of the register, as verified by affidavit, shewed the gross tonnage of the vessel to be 2964·27 tons, and the plaintiffs arrived at the figures, 2867·98 tons, by deducting 96·29 tons, being 69·65 tons crew space, and 26·64 tons navigation space.

The last-mentioned deduction was made under the Merchant Shipping (Tonnage) Act, 1889, s. 3, sub-ss. (*b*), (i.), (ii.), and consisted of 8·01 master's room, 4·09 chart-house, and 14·54 boatswain's store-room.

The vessel was constructed with a double bottom, and the space so occupied was not included in the gross tonnage, as it

(1) 25 & 26 Vict. c. 63, s. 54: "The owners of any ship . . . . shall not . . . . be answerable in damages . . . . in respect of loss or damage to ships, goods, merchandize, or other things . . . . to an aggregate amount exceeding 8*l.* for each ton of the ship's tonnage; such tonnage to be . . . . in the case of steamships, the gross tonnage without deduction on account of engine room."

was used for water ballast and was not available for the carriage of cargo, stores, or fuel.

By par. 4 of the defence on behalf of owners of some part of the cargo lately laden on board the *Venus*, it was alleged that ". . . . the plaintiffs are liable under and by virtue of s. 54 of the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), to pay the sum of 8*l.* per ton, with interest upon the gross tonnage of the *Zanzibar*, without deduction on account of engine room, and not only upon the gross register tonnage of the said ship without deduction on account of engine-room space as alleged, and the gross tonnage of the said ship includes the master's room, chart-house, boatswain's store-room, *and the space between the double bottom of the said vessel*, and by reason thereof the plaintiffs are liable to pay for the said spaces at the rate of 8*l.* per ton, in addition to the sum of 22,943*l.*, which has been arrived at by calculating 8*l.* per ton on the tonnage of the said vessel without the said spaces."

It was admitted by the plaintiffs at the hearing that the deduction of 26·64 tons on account of master's room, chart-house, and boatswain's store-room could not be supported by reason of the decision in *The Umbilo* (1); but it was contended that the space included in the double bottom need not be calculated, as the owners of the *Zanzibar* were entitled to measure in the way prescribed by s. 5 of the Merchant Shipping (Tonnage) Act, 1889 (2)—that is, to the upper side of the inner plating of the double bottom, these words being substituted by that Act for the floor timber mentioned in sub-s. 2 of s. 21 of the Merchant Shipping Act, 1854. (3)

(1) [1891] P. 118.

(2) 52 & 53 Vict. c. 43, s. 5: "In the case of a ship constructed with a double bottom for water ballast, if the space between the inner and outer plating thereof is certified by a surveyor appointed by the Board of Trade to be not available for the carriage of cargo, stores, or fuel, then the depth required by s. 21, par. (2), of the Merchant Shipping Act, 1854, shall be taken to be the upper side of the inner plating of the double bottom and that upper side shall, for the purposes of measurement, be deemed to represent the floor timber referred to in that section."

(3) 17 & 18 Vict. c. 104, s. 21, sub-s. (2): " . . . . measure the depth at each point of division, from a point at a distance of one-third of the round of the beam below such deck . . . . to the upper side of the floor timber at the inside of the limber strake . . . ."

1892

THE ZANZIBAR.

H. Holman, for the plaintiffs, the owners of the *Zanzibar*.

F. W. Raikes, for the owners of a portion of the cargo of the *Venus*.

[The arguments of counsel in respect of the question of measuring or not the space included in the double bottom sufficiently appear from the judgment. In addition to the cases there mentioned the following were cited for the plaintiffs: *The John McIntyre* (1); *Burrell* v. *Simpson*. (2)]

Newson, for the owners of the *Venus*, and for the owners of part of her cargo, supported the view of the other owners of cargo, and asked that the usual period of three calendar months from the date of the decree for bringing in claims might be shortened, on the ground that the collision had happened more than a year ago, and therefore practically all the claimants were already known, and if the full period were allowed the proceedings on the reference would be thrown over the Long Vacation. [The date, July 1, was suggested as convenient, and assented to on behalf of the other parties.]

JEUNE, J. I think this is a matter which, when one looks at it, seems tolerably clear. We start with the 54th section of the Act of 1862. There, for the purpose of getting at the liability of the owners of a ship, you have to ascertain the gross tonnage without deduction of engine-room space. Then you have to ascertain what is the gross tonnage, and for that you have to go to the Act of 1854 in the first instance, and to the 21st section of that Act. As was pointed out during the argument, the construction of vessels contemplated in that Act is not the construction which has become common in recent days. What it lays down in sub-s. 2 is, that for the purposes of calculation, you have to measure the depth down to the upper side of the floor timber. That, at the time the Act was passed, was perfectly simple, because the floor timber would be no substantial distance from the actual bottom of the ship. Afterwards ships were made differently, and the floor upon which the cargo was placed was raised higher. It was found, I suppose, that there was a waste of space below, inasmuch as you had to put dunnage in case water

(1) 6 P. D. 200. (2) 4 Court Sess. Cas. 4th Series, 177.

should get in to some extent and damage the cargo. The best plan was found to be to put the floor somewhat higher, which enabled water to be put into the vacant space, and serve as water ballast. Then comes the question—is that space to be measured for the purpose of ascertaining the gross tonnage? I confess I should have thought that the construction of the Act of 1854 was that where you had to go down to the upper side of the floor timber it meant going down to the top of this double bottom, and no lower. Of course, what has been said is true, that that gives an advantage to the shipowner, because before he had a space which he could only fill with dunnage, and which he had to pay for. Now I suppose he has a space for which he does not have to pay, and which is used for water ballast. No doubt that is an advantage; and I daresay that is one of the reasons why this construction of ships was adopted. The question is, how do the words of the Act of 1854 apply to the new mode of construction? It appears to me that the effect is, with the new mode of construction, that measurement down to the floor on which the cargo is placed satisfies the terms of the Act of 1854. It does seem remarkable that nobody has ever before thought of claiming to include that space in the measurement for the purposes of liability. It certainly does look as if the common sense of shipbuilders and surveyors told them that substantially a steamer constructed in this way ought to be measured down to this floor and no further. But possibly doubts may have existed about it; and then came the Act of 1889 (52 & 53 Vict. c. 43). It seems to me that the object of that Act was to make matters clear, owing to the new practice which had sprung up. The Act of 1889, s. 5, provides in terms that a certain interpretation is to be put for certain purposes on the Act of 1854. It says that where a ship is constructed with a double bottom for water ballast, if the space between the inner and outer plating is certified as not available for the carriage of cargo, stores, or fuel, then the depth required by s. 21 of the Act of 1854 shall be taken to be the upper side of the inner plating of the double bottom. If that is so, I need no longer consider what would have been the true construction to place on the Act of 1854. The later Act explains what the upper side of the floor timber

1892

THE ZANZIBAR.

Jeune, J.

means, and I must now, I think, look to the Act of 1854 as if these words had been part of it. But it is said that the Act of 1889 only applies for the purpose of ascertaining the register tonnage, and that the object here is to obtain the gross tonnage. That is true of some of the sections, but not of all of them. It is true of ss. 1 and 3, but not of s. 5, which is simply an interpreting section, giving further meaning to the words in the Act of 1854, and containing no limitation as to whether it is for the purpose of ascertaining the register tonnage or not. That, I think, distinguishes the case of *The Umbilo* (1), heard before the late President, Sir James Hannen. There the question was whether certain navigation spaces were to be deducted, and the learned judge refers to s. 1 of the Act of 1889, in which it is enacted that in the measurement of a ship, for the purpose of ascertaining her register tonnage, no deduction is to be allowed in respect of any space which has not first been included in her gross tonnage. But, as I have already pointed out, the gross tonnage forms the measure of the ship's liability, and therefore *The Umbilo* (1) does not affect the question of the amount of tonnage to be taken for that purpose. If that be so, it simply comes to be a question of the interpretation of a section of the Act of 1854, to which *The Umbilo* (1) does not apply. Then it is said that s. 22 of the Act of 1854 affects the question because it provides that a ship which, requiring to be measured for a purpose other than registry, has cargo on board, shall be measured under a different rule; but I do not think that applies to the present case. What I think that means is that if you cannot get the measurement, by reason of the cargo being on board, under s. 21, then you may take the rough-and-ready method under s. 22. Therefore, s. 22 does not apply, because there was no reason why they should resort to it. Then it is said that the cases of *The Franconia* (2) and *The Palermo* (3) affect the matter. It seems to me that these cases really confirm the view I have taken. What *The Franconia* (2) decides is that where the crew were berthed, not on the upper deck, but on a deck between the spar-deck and the tonnage-deck, the owners

(1) [1891] P. 118. (2) 3 P. D. 164.

(3) 10 P. D. 21.

1892

THE ZANZIBAR.

Jeune, J.

could not claim to exclude that space. They could not exclude it under the Act of 1854 because they were not within it, nor under the Act of 1867, because they had not fulfilled its conditions. But in the subsequent case of *The Palermo* (1), where the crew were placed on a deck which came within the provisions of the Act of 1854, then it was held that they were entitled to claim the provisions of the Act in their favour, because, in fact, they complied with them, and did not have to rely on the Act of 1867, and were not subject to the conditions precedent to the Act. That brings us back to the simple point in this case—whether the space is to be reckoned under the Act of 1854, with the interpretation of the Act of 1889. I think it is, and, therefore, what I understand to be taken as the measurement in this case is correct, and it is right to exclude this space used for water ballast.

The result is that the deductions for master's room, chart-room, and boatswain's store-room will be disallowed; but the space occupied by the double bottom will not require to be added. The plaintiffs will pay the costs of the suit, except any occasioned by the objection as to the double bottom. July 1 will be fixed as the last day for bringing in claims.

Solicitors for the plaintiffs, the owners of the *Zanzibar*: *Downing, Holman & Co.*

Solicitors for defendants, the owners, master, and crew of the *Venus*, and the owners of cargo lately laden thereon: *Pritchard & Sons.*

Solicitors for defendants, the owners of part of the cargo lately laden on board the *Venus*: *Waltons, Johnson, Bubb, & Whatton.*

(1) 10 P. D. 21.

T. L. M.

1892
May 13, 16.

GOULDER *v.* GOULDER.

Divorce—Domicil—Jurisdiction.

In a petition by the wife for divorce, on the ground of the husband's adultery and desertion, it appeared that both husband and wife were born in France, of parents born in England but resident in France. The marriage took place in England, but the husband and wife subsequently resided in France. The respondent, on coming of age, made a declaration of his intention to retain his English nationality, and it also appeared that both he and his father contemplated returning to England when they had made sufficient money to maintain them. The respondent, after deserting his wife, led an unsettled life in New Zealand and the Australian Colonies:—

Held, that both parties had an English domicil at the commencement of the proceedings, and that the Court, therefore, had power to entertain the petition and to dissolve the marriage.

PETITION for dissolution of marriage by the wife on the ground of the husband's adultery and desertion. The respondent did not appear and had filed no answer.

The parties were children of British-born subjects resident at St. Pierre, near Calais, France. They were both born in France, and resided in France after their marriage, which was celebrated at Dover in the year 1877, the husband being then about twenty years of age. On coming of age he made a declaration in the form required by the Code Civil to be made by all foreigners born in France of French-born parents, that it was his intention to retain his English domicil, although it was not in strictness required of him, as his parents were born in England, and the father of the respondent, who was examined at the hearing, stated that his own intention, and, as far as he was aware, his son's intention, was to return to England when they had made sufficient money to maintain them.

In 1885 the respondent left his wife without assigning any reason, and made his way to Auckland, New Zealand, where he was proved to have committed adultery, passing under the name of Gardner. He was subsequently seen in New South Wales; but he had never communicated with his wife after leaving her, nor contributed to her support. The petitioner had contemplated taking proceedings for divorce in France, but was advised that

the French Court would not grant a final decree of divorce in the case of foreigners. There was one child of the marriage.

The other facts will be found in the judgment; but the only question was whether the Court had jurisdiction to dissolve the marriage.

The petition was heard before Lopes, L.J., without a jury.

Inderwick, Q.C., (*Searle*, with him), for the petitioner, cited *Deck* v. *Deck* (1), *Bond* v. *Bond* (2), and *Niboyet* v. *Niboyet*. (3)

A member of the French bar, and counsel to the French Embassy in London, was called, and stated that the French Courts, unless the parties submitted themselves to their jurisdiction voluntarily, would not grant a final decree of divorce between foreigners, although they would make orders—mesures provisoires—in interlocutory matters such as alimony, custody of children, and the like. He referred to Dalloz, Jurisprudence, Supp. Divorce. As to the declaration taken by the respondent, it was unnecessary, inasmuch as by the law in 1878 it was only required from persons born in France whose parents had also been born in France; but the present law, by which every foreigner born in France became a French subject unless on attaining the age of twenty-one he made a declaration of his intention to retain his domicil of origin, was not passed until June, 1889.

Cur. adv. vult.

LOPES, L.J. The petitioner prays a divorce from her husband on the grounds of desertion and adultery. Both these charges are established to my satisfaction. But a question arises as to the jurisdiction of the Court to pronounce a decree nisi, having regard to the facts of this case, which I propose now to state. The father and mother of the respondent are British-born subjects, the father having a domicil of origin in England. The father (a son of English parents) was a lace-maker in Nottingham. In 1855 he married an Englishwoman in England, and went with his wife that year to St. Pierre, a suburb of Calais, where a large lace-making business is carried on, chiefly

(1) 2 Sw. & Tr. 90. (2) 2 Sw. & Tr. 93.

(3) 4 P. D. 1.

1892

GOULDER v. GOULDER.

Lopes, L.J.

by English. It appears that for many generations past St. Pierre, a suburb outside the fortifications of Calais, has been largely resorted to by English lace-makers from Nottingham and Devonshire, and other places in England. They appear to go and reside there for the purpose of carrying on their business and making money, but, according to the evidence, with the ultimate fixed intention of returning to England and resuming their native home. The respondent and petitioner were born at St. Pierre, and the respondent was married to the petitioner on May 14, 1877, at Dover, by his father's desire, the petitioner being the child of English parents, who were also domiciled in England. The respondent when he married was under the age of twenty-one. Within a year of his attaining his majority he made a declaration, the body of which is in his father's handwriting, which, so far as is material, is as follows: "Neither I nor my father have done or suffered anything whereby I have become deprived of my nationality as a natural-born British subject." The law of France, as spoken to by a gentleman versed in French law, called from the French Embassy, up to the year 1889, was that any one born in France of a foreigner, who was himself born in France, was to be deemed a Frenchman unless within a year of his attaining his majority he disclaimed his nationality. The petitioner also made a declaration in 1880 declaring her nationality to be English. This declaration was made in consequence of a return directed by the French Government for the purpose of ascertaining the number of foreigners at the time within the French dominion. I do not consider this declaration affects this case. It was proved to me that the father of the respondent had a fixed intention of returning to England and resuming his domicil of origin. It was also proved that the respondent himself always had a similar intention—an intention which neither of them ever relinquished. The respondent was in the employ of his father, and resided in St. Pierre up to 1885, and father and son constantly visited their relations in England, where they had agents both in London and Manchester. In 1885, the respondent, without giving his wife any intimation of his intention, left his home, and was next heard of in Auckland, and subsequently was dis-

covered in Queensland, where he had formed an adulterous connection with a certain woman in that place. It is not known where he is at present or what he has been doing abroad. The practice of the French Courts, as proved by the French lawyer called from the French Embassy, is not to grant a final decree of divorce where the parties are not domiciled in France, although they will grant interlocutory relief, e.g., for alimony or custody of children. The petitioner was advised she could not maintain her suit for divorce in the French Courts. She has consequently instituted this suit. As a general principle, it may be stated that jurisdiction in matters of divorce depends upon the domicil of the parties to a marriage at the time of the commencement of the proceedings for divorce. The English Divorce Court has jurisdiction to dissolve the marriage of any parties domiciled in England at the commencement of such proceedings, and this, independently of the residence of the parties, the allegiance of the parties, the domicil of the parties at the time of the marriage, the place of the marriage, or the place where the matrimonial offence or offences have been committed. I have come to the conclusion that the petitioner and respondent at the time of the commencement of the divorce proceedings in this case (viz., 1889), were domiciled in England, and that, therefore, this Court has power to dissolve the marriage. The wife, on marriage, takes her husband's domicil. What was his domicil at that time? It was his domicil of origin—England. In the absence of his acquiring any new domicil his domicil would be the domicil of his father. His father's domicil was English. He resided, no doubt, at St. Pierre, but, according to the evidence, only for a temporary purpose, with no animus manendi, but with an intention of returning to England. The son never acquired any domicil for himself. The evidence, again, is that he resided in St. Pierre only for a temporary purpose, with a fixed intention of returning to England, and the declaration he made respecting his nationality shortly after coming of age is a corroboration of his intention. Neither the father nor the son had any intention of residing in France for an unlimited time or for an indefinite purpose; their intention was to reside there for a limited time and for a definite purpose. I have no reason to believe the

1892

GOULDER v. GOULDER.

Lopes, L.J.

respondent has acquired any new domicil since he deserted his wife in 1885. He has been leading an unsettled life, sometimes residing in Auckland, in the colony of New Zealand, sometimes at Sydney, in the colony of South Wales, sometimes in Queensland, and other places in Australia. He has abjured the realm, has deserted his wife, without any intention, so far as I know, of permanently establishing himself anywhere. His domicil of origin, therefore, remains, which is also the domicil of the petitioner, his wife. In these circumstances, I hold that the domicil of the petitioner and respondent is English, and that this Court has power to pronounce a decree nisi for dissolution of the marriage, with costs—the petitioner to have the custody of the child, she undertaking to bring it within the jurisdiction if called upon.

Solicitor: *F. Stunt.*

W. L.

C. A.

1892

June 14, 22.

[IN THE COURT OF APPEAL.]

THOMPSON *v.* ROURKE.

Divorce—Practice—Jactitation of Marriage—Trial by Jury—Undefended Suit.

It is not the practice of the Court to order a suit of jactitation of marriage to be tried by a jury if the defendant has put in no defence.

APPEAL from an order of Jeune, J.

The plaintiff, Mrs. Thompson, commenced a suit of jactitation of marriage against the defendant Rourke, praying that it might be declared that no marriage had taken place between the plaintiff and defendant, and that the defendant might be restrained from alleging that any such marriage had taken place. The defendant entered an appearance, but put in no defence.

The plaintiff applied to Jeune, J., for an order that the action might be tried by a jury. The learned judge refused the application, and the plaintiff appealed.

The plaintiff, who sued in formâ pauperis, appeared in person in support of the appeal.

The defendant did not appear.

Cur. adv. vult.

C. A. 1892

THOMPSON v. ROURKE.

1892. June 22. LINDLEY, L.J. Suits of jactitation of marriage are so rare in modern times that we desired to inquire into the practice. There is an excellent account of it to be found in *Lord Hawke* v. *Corri*. (1) In the present case the defendant has entered an appearance, but has put in no defence. Therefore, there is at present nothing to be tried. If a defence should be put in there might be something to be tried; and, in that event, the judge would, no doubt, according to the ordinary practice, order a trial by jury. As matters now stand, it would be contrary to the practice of the Divorce Court to order a trial by jury.

LOPES and KAY, L.JJ., concurred.

Appeal dismissed.

M. W.

GRANGE *v.* GRANGE AND ARENDT.

1892 *June* 21.

Divorce—Co-respondent out of Jurisdiction—Co-respondent dismissed from the Suit—Costs.

A co-respondent, after entering an appearance unconditionally, filed an answer alleging that his domicil was German; that the adultery charged, if committed at all, was committed in Germany, and that the citation had been served on him in the United States, and claiming to be dismissed from the suit:—

Held, that the co-respondent might be dismissed from the suit; but that as he had not taken the earliest opportunity of disputing the jurisdiction, he was entitled only to his costs of appearance.

MOTION to dismiss the co-respondent from a suit for divorce on the ground of want of jurisdiction.

It appeared from the petition that the parties were married in England in 1884, and cohabited in this country until the end of 1891. The acts of adultery charged were alleged to have been committed with the co-respondent in Berlin, and elsewhere in Germany, in October, 1891, while the respondent was on a visit to the Continent.

The co-respondent, who is a German, entered an appearance unconditionally and filed an answer, in which, after a general denial of the adultery, he pleaded that he was domiciled in Germany;

(1) 2 Hagg. Cons. 280.

1892

GRANGE v. GRANGE.

that he had never had an English domicil; that the adultery charged was alleged to have been committed in Germany; that the citation was served upon him in America; and that by reason of these facts the Court had no jurisdiction over him.

Barnard, moved, on behalf of the co-respondent, that he be dismissed from the suit.

Searle, for the petitioner. The petitioner was obliged to make the co-respondent a party to the suit, and it is doubtful whether the Court would have given leave to proceed without a co-respondent. The petitioner, having regard to the domicil of the co-respondent, has no objection to his being dismissed from the suit if the Court thinks that the proper course to be pursued; but there is no reason why his costs should be paid by the petitioner.

Barnard, in reply. The co-respondent ought never to have been made a party to the suit, and he is entitled to his costs. It is quite clear on the admitted facts that the Court has no jurisdiction over him, and *Gaynor* v. *Gaynor* (1) is an authority for giving the co-respondent his costs when he is for this reason dismissed from a suit.

[THE PRESIDENT (SIR F. H. JEUNE). There the co-respondent appeared under protest, and in *Wilson* v. *Wilson* (2) the Court drew the strongest distinction between appearing under protest and denying the jurisdiction.]

All that an appearance under protest means is, that the question of jurisdiction must be decided before the issue of adultery is tried. But, even if the co-respondent has not appeared under protest, he is entitled to be dismissed from the petition if the Court has no jurisdiction over him.

Searle, for the petitioner. If the petitioner stood on his strict rights, he might object to the co-respondent being dismissed from the suit, for he has entered an absolute appearance, and has denied the adultery.

THE PRESIDENT. If objection is taken to the jurisdiction, it ought to be taken at the earliest possible moment; and if that is

(1) 31 L. J. (P. & M.) 116. (2) Law Rep. 2 P. & D. 353.

not done, any costs which the co-respondent incurs ought afterwards to fall upon him. The right order to make will be to dismiss him from the suit, and to order the petitioner to pay the costs of his appearance only.

Solicitors for petitioner: *Rollit & Sons.*
Solicitors for co-respondent: *Hicks & Son.*

W. L.

PATON *v.* ORMEROD (PATON INTERVENING).

1892
March 18, 29.

Probate—Will—Incorporation—Words of Reference—Latent Ambiguity—Parol Evidence.

A testatrix, by a will executed in 1873, bequeathed the residue of a fund over which, under the will of her brother, she had a power of appointment, to her two daughters, Mrs. B. and Mrs. P., with remainder to their respective husbands and children. She had also previously by deed appointed the residue of another fund between them, and Mrs. P.'s share so appointed was settled on her on her marriage. Mrs. B. predeceased her mother, and by a codicil executed in 1877 the testatrix revoked the bequest to her and her family; but she made no alteration in the bequest to Mrs. P. In 1881, testatrix made another will, which revoked all former wills, and appointed C. O., the defendant in the suit, her residuary legatee. This will contained the following recital: "Whereas I have also settled one undivided moiety of the residue of the said third part of 100,000*l.*, to which I am entitled under the will of my said brother, in favour of my said daughter, E. J. P.":—

Held, that this recital did not refer to the will of 1873 so as to raise the question whether it incorporated it by reference:

Held, further, that there was no such ambiguity as to make declarations by the testatrix of her intention admissible in evidence.

MATILDA BAGOT, deceased, late of the Warren, Chichester, in the county of Sussex, died on July 4, 1889, leaving a last will and testament duly executed, and bearing date March 5, 1881, of which she appointed the defendant, Charles Edward Ormerod, an executor and residuary legatee, and which was proved by him. This will revoked all previous wills.

On February 14, 1873, the deceased had executed a will, and at subsequent dates she executed four codicils to this will, by which she made provision for her two sons and two daughters, Mrs. Bernal and Mrs. Paton, in accordance with the varying circumstances of the family.

Under the will of her brother Algernon Perkins the testatrix

1892

PATON v. ORMEROD.

was entitled to a third of a sum of 100,000*l.*, and a third share of his residuary personal estate, and, prior to the execution of the will of 1873, she had appointed 16,000*l.* out of the said third of the 100,000*l.* to her son Ponsonby Bagot. By her will of February 14, 1873, she bequeathed the residue of her third of the 100,000*l.* and also her share of the residuary estate, upon trust, in equal shares for her two daughters, Mrs. Bernal and Mrs. Paton, and their families.

On December 24, 1872, the testatrix made appointments by deed out of a different fund, which was not however completely dealt with, in favour of her two daughters; and on January 23, 1873, on Mrs. Paton's marriage, a document was executed settling the money which had been appointed to her under the deed of December 24, 1872.

Mrs. Bernal died April 21, 1877, and by codicils to the will of 1873, made subsequently to her death, the testatrix revoked the bequest to Mrs. Bernal and her family, and appointed their share of the residue first among her sons, and finally to the defendant; but she made no change in the disposition in favour of Mrs. Paton and her family.

The will of 1881 revoked all previous wills, and appointed the defendant sole residuary legatee; but it contained a passage referring to the will of 1873, which will be found in the judgment, which it was contended revived and incorporated the provisions of that will in favour of Mrs. Paton and her family. The other facts will also be found in the judgment.

The plaintiff was the husband of Mrs. Paton, who died October 11, 1885, and the interveners were her children. By their pleadings they alleged that the will of 1881 was not duly executed, and claimed revocation of it and a grant of probate of the will of 1873, or in the alternative, that probate of the will of 1881 should be granted with the will of 1873, and the codicils to it incorporated.

The defendant pleaded that the will of 1881 revoked the will of 1873 and the codicils, and denied that it revived or incorporated any portion of the deceased's previous testamentary dispositions.

The case was heard before Jeune, J., without a jury.

Bayford, Q.C. (*Searle*, with him), for the plaintiff.
Inderwick, Q.C. (*Ingle Joyce*, with him), for the defendant.
Rigby, Q.C. (*Deane*, with him), for the interveners.

Cur. adv. vult.

JEUNE, J. Mrs. Bagot, the testatrix, had, under the will of her father, Henry Perkins, certain powers of appointment by deed or will among her children and more remote issue over a third part of certain trust moneys; and she was also, under the will of her brother Algernon Perkins, entitled for her separate use to one-third part of a sum of 100,000*l.* By a will made on February 14, 1873, after reciting that she had appointed a certain part of the fund derived from the father in favour of her two daughters, one of whom was Mrs. Paton, she proceeded to exercise her power of appointment over the remainder of that fund in favour of her two daughters, and then, after reciting that she had settled 16,000*l.* out of the fund derived from her brother on her son Ponsonby Bagot, proceeded to leave half the remainder of the fund on certain trusts in favour of her daughter —the words referring to Mrs. Paton's interest being these:— "And as to the other undivided moiety of the said residue of the moneys to which I am entitled under the will of my said late brother upon the same or like trusts, for the sole and separate benefit of my daughter, the said Ethel Jane Paton, during her life, and after her decease for her surviving husband, if any, and after the decease of the survivor of them for the benefit of the children and child of the said Ethel Jane Paton," with remainder, in case of failure of issue of the two daughters, in favour of the two sons of the testatrix. To this will there are four codicils; but none of them affect the question now to be decided. They left the above-mentioned provision in the will of 1873 in favour of Mrs. Paton untouched. On March 5, 1881, Mrs. Bagot made another will, and at the conclusion of it occurs the following passage: "And whereas, by virtue of the will of my late brother Algernon Perkins, Esq., I am entitled for my separate use to one-third part of the sum of 100,000*l.* therein mentioned or referred to, and also to

1892

PATON v. ORMEROD.

Jeune, J.

one-third part of certain Reduced Annuities and New 3 per Cent. Annuities, or the investment thereof for the time being, subject to certain charges and directions in the same will, made and contained. And whereas I have settled the sum of 16,000*l.*, part of the said moneys to which I am so entitled by virtue of my late brother's will, in favour of my said son Ponsonby Bagot, and I have also settled one undivided moiety of the residue of the said one-third part of 100,000*l.*, to which I am so entitled under the will of my said brother, in favour of my said daughter Ethel Jane Paton and her family. Now I give and bequeath the other undivided moiety of the residue of the said one-third part of the said sum of 100,000*l.* unto Charles Edward Ormerod, now residing at the Nunnery, Horsham, absolutely for his own use and benefit."

The question is whether the will of 1873, or the part of it containing the bequest to Mrs. Paton for life, with remainder to her husband and children, is incorporated by the will of 1881, and should therefore be admitted to probate, and the main point to be decided is whether the recital "whereas I have also settled one undivided moiety of the residue of the said third part of 100,000*l.*, to which I am so entitled under the will of my said brother, in favour of my said daughter Ethel Jane Paton and her family," refers to that bequest in the will of 1873.

Parol evidence is admissible to shew what documents exist to which the recital may refer, and it seems clear on the evidence that the will of 1873 is the only document in existence to which the words are applicable.

There was a settlement by deed in favour of Mrs. Paton of part of the fund arising under the will of the father of Mrs. Bagot, but none in favour of Mrs. Paton of any part of the fund arising under the will of Mrs. Bagot's brother. The words in question are no doubt legally applicable to the will of 1873, because a settlement may be made by a will. Now, to see whether the words do refer to that document, I have to look at the language of the whole will, and I think that from the language of the will it ought to be inferred that the words in question do not refer to the will of 1873. There appear to me to be three main grounds for this conclusion. First, the language, though not

legally unfit to refer to the will, is by no means what it was to be expected would have been used for that purpose. Any one, I think, who had the will of 1873 in his mind, would naturally have spoken of bequeathing or devising, or leaving by will, and not of settling, and would also not have excluded all reference to the husband. Secondly, the immediately preceding words in the recital refer to a settlement of another part of the fund in question which was a settlement by deed, having force by itself outside testamentary provisions, and the reference to that settlement was merely to elucidate the subsequent words of bequest. It is not natural to use exactly similar words with regard to a settlement of a wholly different character, and referred to for a different purpose. Thirdly—which to my mind is the strongest consideration—that part of the will which I have read appears to me to be so framed as to be inconsistent with an inference that the will of 1873 was in the mind of the testator. If the reference be supposed to incorporate the will of 1873 and preserve the benefit of its effect for Mrs. Paton, or be supposed to incorporate such will without that effect, or be supposed not to incorporate it at all, the form either of the revocatory clauses or of the special bequest to Charles Ormerod becomes so awkward as to render it highly improbable that the will of 1873 was in truth the object of reference. It is especially difficult to suppose that so uncertain a reference was intended to cut down the general language of the clause of revocation. On the other hand, if the reference was to a settlement made inter vivos, real or imaginary, which it was intended to leave untouched, the provisions referred to become natural and consistent. If evidence of declarations of the testatrix are admissible in evidence, there can be no doubt that the reference in the will of 1881 was not to the will of 1873, but to a settlement by deed which she thought existed, but which did not in fact exist. But I do not think this evidence admissible, and have excluded its effect from my mind. It seems to me clear that the necessary foundation has not been laid for the reception of that evidence. In every case the will and the whole will must be looked at to see the meaning of the terms used and the possible application of description. Parol evidence of existing facts and circumstances

1892

PATON v. ORMEROD.

Jeune, J.

outside the will is admissible, and in truth is in every case necessarily, though informally, admitted in order to apply the terms to that to which they are intended to refer. If the terms of the will itself, or if such evidence of surrounding facts and circumstances considered in connection with the will shew an ambiguity to exist—that is to say, if this or that object equally fulfils the description found in the will, in such cases, and, as Lord Abinger says in *Doe* v. *Hiscocks* (1), in such cases only, recourse may be had to the declarations of the testatrix, because the problem is otherwise insoluble, and because such recourse under such conditions constitutes no attempt to vary by parol evidence the terms of the will. But in this case we never reach the stage of an ambiguity appearing within the horizon of real facts. Except in the mistaken belief of the testatrix, there is nothing to compete with the claim of the will of 1873 to be the object of reference in the will of 1881, and we have a right to look into the belief of the testatrix only to solve, and not to create, an ambiguity. In the above view it is not necessary to consider whether, if it had been shewn that part of the will of 1873 had been referred to, either the whole or such part would have been incorporated, and I express no opinion on that point. As this point of construction is a doubtful one, and as the difficulty has arisen by the fault of the testatrix, the costs of all parties must come out of the estate.

Solicitors for the plaintiff: *Dunster & Chapman.*

Solicitors for the defendants: *Peake, Bird, Collins, & Peake.*

Solicitor for the intervener: *M. L. B. Braund.*

(1) 5 M. & W. 368.

W. L.

IN THE GOODS OF G. Y. HEATH. 1892 *June* 28.

Probate—Will—Codicil—Unattested Interlineations—Incorporation by Reference.

A testator, after the execution of his will, made various alterations and interlineations, some of which were attested and some unattested. Among the latter was an interlineation giving a legacy of "1000*l.* to each of my executors." In the body of the will he gave a legacy of 10,000*l.* to one of his executors. In a codicil the testator recited that he had given a legacy of 11,000*l.* to this particular person:—

Held, that this reference shewed that the interlineation had been made prior to the execution of the codicil, and that it was therefore incorporated by it.

APPLICATION for probate of a will and codicil with an unattested interlineation.

George Yeoman Heath, late of Cocker Hall, in the county of Durham, died March 4, 1892, leaving a will duly executed bearing date June 12, 1891, by which he appointed his nephews, Edward Heath Everett and John Pearson, and Miss Mary Jane Spenceley, his executors. He made numerous bequests, and among others he gave 10,000*l.* to Miss Spenceley, and appointed her his residuary legatee.

After the will was executed he took it home with him, and made various alterations and interlineations in it, some of which were initialed and some were not. In the clause appointing executors he had inserted these words after the word executors: "and to each of my executors I give the sum of 1000*l.*" This interlineation was not initialed.

Subsequently he made a codicil in his own handwriting, which was duly executed, to the following effect: "I have already, in my will of June 12, 1891, nominated Miss Mary Jane Spenceley as my residuary legatee. As regards the legacy of 11,000*l.* left to her, and also as to any other money which may come to her, I desire that in case of her marriage the whole of the money coming to her under my will should be settled strictly upon her; as regards the 11,000*l.*, upon her children if she has any; but as regards any money coming to her as residuary legatee, although in case of her marriage I desire this to be strictly settled upon herself, nevertheless, as to the ultimate application of it, I desire

1892

IN THE GOODS OF HEATH.

that it be made according to a certain agreement and direction which she shall receive from me."

Inderwick, Q.C. (*Priestley*, with him), moved for probate of the will and codicil with this interlineation inserted, as well as the other interlineations which had been attested. Although these words had been inserted after the will was executed, they were clearly there when the codicil was executed, inasmuch as it speaks of a legacy of 11,000*l.*, which figures can only be arrived at by adding the 1000*l.* given to each of the executors to the bequest of 10,000*l.* in the will.

THE PRESIDENT. I think that is the correct inference to be drawn from the language of the will and codicil. The reference to the legacy of 11,000*l.* shews that the codicil was executed after the interlineation, and is sufficient, I think, to incorporate the interlineation.

Solicitor: *James Crowdy.*

W. L.

1892

July 5.

IN THE GOODS OF CLEMENTS.

Probate—Will not forthcoming—Probate of Codicil.

Testator executed a codicil which was described as "a codicil to my will executed some years ago." After his death no trace of the will could be found:—

Held, that probate of the codicil might be granted.

THOMAS WELLINGS CLEMENTS, late of 72, Norton Street, Birmingham, died on March 8, 1892, having, on March 4, 1892, duly executed a codicil which was described as "a codicil to my will executed some years ago," of which he appointed Mary Brown and Sydney Mitchell the executors. From the affidavit of Mr. Mitchell, who was the solicitor who drew the codicil from testator's instructions, it appeared that the testator refused to give him any information as to the nature of his will or as to its whereabouts, and would say no more about it than that he was dissatisfied with it, and that it did not carry out his wishes. After the testator's death, Mr. Mitchell searched for the will

1892

IN THE GOODS OF CLEMENTS.

among his effects, made inquiries of all the solicitors in the neighbourhood, and advertised for it in various newspapers, but had been unable to find any trace of its existence.

L. D. Powles, moved, on behalf of the executors, for probate of the codicil. *In the Goods of Coulthard* (1) is an authority for giving probate of a codicil where no will can be found. The widow of the testator assents to the present application.

R. H. Pritchard, for the two sisters of the testator, and *Dodd*, for the brother and heir-at-law, who with the widow were the sole persons entitled in distribution, also consented.

THE PRESIDENT. On the authority of the case cited I make a grant of probate of the codicil.

Solicitors for the executors: *Maples, Teesdale & Co.*
Solicitors for the sisters: *Chesters.*
Solicitors for the heir-at-law: *Seagrove & Woods.*

W. L.

IN THE GOODS OF SPENCELEY.

1892

June 28.

Administration—Presumption of Death—Foreign Grant followed.

Where a foreign court of competent jurisdiction had made a grant of administration on the presumption of the death of the intestate:—

Held, that the grant might be accepted by the Court of Probate as sufficient proof of the death without requiring it to be proved by independent evidence.

APPLICATION for administration on presumption of death.

James Spenceley the younger was born at Leeds in the county of York in 1830, and in 1842 he left England with his father, James Spenceley the elder, and his family for Philadelphia. In 1856 James Spenceley the elder left Philadelphia and went to La Crosse, Wisconsin, with his family with the exception of James Spenceley the younger, who, about the same time, went to the Southern States. He was not seen after the year 1860 by any member of his family, but he corresponded with them up to the year 1879, since which time nothing whatever had been heard of him. When he was last heard of he was in the State of Florida.

(1) 11 Jur. (N.S.) 184.

1892

IN THE GOODS OF SPENCELEY.

By the will of his grandfather, Simeon Spenceley of Leeds, James Spenceley the younger, on the death of his father, became entitled to a share of the residue of his estate held by trustees in this country. The father died in 1890, and in August, 1891, John Hilton Spenceley, the brother of James Spenceley the younger, petitioned the county court of La Crosse, Wisconsin, that administration of the estate of his brother might be granted to him. Notice of this application was advertised in Wisconsin papers; but there was no reply to these advertisements, and, on September 1, 1891, the county court granted to John Hilton Spenceley letters of administration of the personal estate of James Spenceley on the ground, as stated in the grant, that "his whereabouts was unknown, that he had been unheard from for more than seven years and was legally dead."

Searle, moved for a grant of administration to the personal estate of James Spenceley the younger to his brother John Hilton Spenceley, and submitted, that as the grant had been made by a court of competent jurisdiction in the country where the presumed deceased was domiciled, this Court would accept that grant as a whole and would not require independent evidence of the death.

THE PRESIDENT. There might be some doubt whether the person whose death was presumed was domiciled in the State of Florida or in the State of Wisconsin; but his father was certainly domiciled in Wisconsin, and there is no evidence that he himself had acquired a new domicil. I am satisfied that the Court of Wisconsin was competent to make a grant of administration, and I am inclined to accept and follow the grant as it stands without requiring any evidence of this man's death. You may, therefore, take the grant as prayed. The applicant will have leave to swear that the intestate's death occurred in or since the year 1879.

Solicitors: *Richard Smith & Sons.*

W. L.

IN THE GOODS OF W. JACKSON. 1892 July 5.

Administration with Will annexed—No known Relatives of Testator, and no residuary Legatee appointed—Grant to a Stranger.

A testator, by his will, bequeathed a life interest in his estate, which consisted solely of five leasehold houses, to his wife, with remainder to his stepson, whom he nominated his sole executor. The stepson died without having proved the will, and his wife took out administration to his estate. The testator's widow entered into possession, and received the rents of the houses during her life, and by her will bequeathed them to her son C. B., who proved the will. Disputes having arisen as to the interests of other members of the family under a previous will, it was arranged that the stepson's administratrix should take out letters of administration with the will annexed to the estate of the testator and divide the property; but she died before the arrangement could be carried out. The testator had no known relatives, and his will did not appoint a residuary legatee:—

Held, that under the circumstances a grant of administration with the will annexed to the estate of the testator might be made to C. B.

WILLIAM JACKSON, late of No. 40, Hope Street, Battersea, in the county of Surrey, died on August 1, 1889, without any known relatives, leaving a last will and testament duly executed, by which he revoked all previous wills, dated July 8, 1889.

The deceased's estate consisted of five leasehold houses at Battersea, and by his will he bequeathed these houses to his stepson Frederick Brown, for his own use and benefit absolutely; but it provided that if his wife Caroline Jackson should survive the testator, these five houses should continue hers for her own use and benefit, and that after her death these houses should then become the property of Frederick Brown. The will contained no residuary clause.

Frederick Brown, the executor, died intestate on November 23, 1890, without having proved the will, and administration to his estate was taken out by his widow Elizabeth Brown on January 23, 1892.

Caroline Jackson, the widow of the testator, survived him and entered into possession, and enjoyed the rents and profits of the five houses until her death on December 29, 1891. She made a will, dated September 16, 1891, wherein she assumed that she was entitled to dispose of the leasehold houses which formed her

1892

IN THE GOODS OF JACKSON.

husband's estate, and did dispose of them, appointing her son Charles Brown her executor. Charles Brown proved the will on March 30, 1892.

The testator, William Jackson, had made a will on July 6, 1889, by which he directed that if his wife survived him she should become possessed of his whole estate; but in case she predeceased him, that it should be divided among such of her children as might be living at the time of her death. Disputes having arisen among the family, an agreement was drawn up by which administration to the estate of William Jackson with the will of July 8, 1889, annexed was to be taken out by Elizabeth Brown, the widow and administratrix of Frederick Brown, and the estate divided between her and Mrs. Jackson's children. A citation was served on the Queen's Proctor on April 13, 1892, and an intimation was received from him that he would not interfere if the administration were limited to the five leasehold houses mentioned in the testator's will. Before the agreement could be carried out Mrs. Elizabeth Brown died.

Durley Grazebrook, moved that a grant of administration with the will annexed of the estate of William Jackson be made to Charles Brown, the executor of Mrs. Jackson's will. To give effect to the agreement, it will be necessary to sell the houses, and no title can be given until a legal personal representative of William Jackson be appointed.

THE PRESIDENT made the grant as prayed, limited to the estate disposed of by the will.

Solicitor: *J. D. Peard.*

W. L.

[IN THE CONSISTORY COURT OF LONDON.]

1892
Feb. 18.

THE RECTOR AND CHURCHWARDENS OF ST. HELEN'S, BISHOPSGATE, WITH ST. MARY OUTWICH *v.* THE PARISHIONERS OF THE SAME (M'DOUGAL INTERVENING).

Ecclesiastical Law—Faculty for Removal of Human Remains buried in Parish Church—Vaults of Ancient Date—Inclination of Court to consult Wishes of Persons interested.

Where application is made to the Court for a faculty to authorize human remains interred in a church or disused churchyard to be removed therefrom and reinterred in consecrated ground elsewhere, the Court, if it grants the faculty, will insert in it provisions authorizing members of families whose relatives are buried in such church or churchyard to remove the remains of their relatives to any particular churchyard or consecrated cemetery selected by them for the purpose of reinterment.

In a faculty authorizing, on sanitary grounds, the removal of human remains interred in a parish church, provisions were, by the directions of the Court, inserted exempting from the operation of the faculty several ancient family vaults.

THIS was a cause of faculty instituted on behalf of the rector and churchwardens of the united parishes of St. Helen's, Bishopsgate, and St. Mary Outwich, in the City of London, for the purpose of obtaining, on sanitary grounds, a faculty authorizing the removal to the City of London Cemetery at Little Ilford of all such human remains as should be discovered in the church of St. Helen's, Bishopsgate, during the carrying out of certain works for the restoration of that church under a previous faculty from the Court.

The cause was now heard, on oral evidence, before the Chancellor of London (Dr. Tristram, Q.C.).

Mr. M'Dougal, a representative of a family, whose vault is referred to in the judgment, appeared in person, and opposed the grant of the faculty.

The evidence, so far as material, is stated in the judgment.

DR. TRISTRAM. In this case the Court on the 18th of August in last year, decreed a faculty authorizing certain alterations to be made in the parish church of St. Helen's, Bishopsgate, with a view to restore it to its original proportions. When the faculty

1892

RECTOR, &c., OF ST. HELEN'S, BISHOPSGATE, WITH ST. MARY OUTWICH v. PARISHIONERS OF SAME.

Dr. Tristram.

was decreed the Court was not aware that so many bodies were buried in the Church, as appears by the evidence now before it, nor that there were remains placed immediately underneath the floor of the Church, nor was it brought to its attention that for some years past the parishioners had complained of effluvia from the remains having penetrated the Church. The Court has now before it the evidence of Dr. Sedgwick Saunders, the medical officer of health for the City of London, as well as the opinion of the medical adviser of the Home Office, that it is essential, if the church is restored as proposed, that, with a view to its sanitation, the bodies should be removed to some other burial-place. There are some few remains buried in vaults which the Court proposes to except from the faculty for removal, viz., the remains of Sir John Crosby, who died 400 years ago; of Sir John Spencer, who died 400 years ago; of Sir William Pickering, who died 350 years ago; of Sir Thomas Gresham, who died 320 years ago; of Sir John Lawrence, who died 180 years ago; and of Sir Francis Bancroft, who died 160 years ago. As these are ancient vaults with ancient monuments erected over them, the Court is prepared to except them from the faculty it is about to decree, as well as the remains of Mr. M'Dougal, Alderman Robinson, and Sir Julius Cæsar. Upon the further evidence the Court is satisfied that it is essential for the sanitation of the church that the other remains should be removed, and the proper place for their reinterment is the Ilford Cemetery. The Court in a previous case has decided that it has jurisdiction to order such removal. (1) It is advisable in making such orders to comply as far as possible with the wishes of members of families whose relatives have been buried in a church or disused churchyard from which a removal is to take place, and if they are desirous of having the remains of their relatives removed to any particular churchyard or consecrated cemetery, the Court will insert provisoes in the faculty authorizing their removal to such churchyard or cemetery. The faculty must issue in general terms, authorizing all remains to be removed except those buried in

(1) See *The Commissioners of Sewers of the City of London and the Vicar and Churchwardens of St. Botolph without Aldgate* v. *The Parishioners of the Same, &c.*, ante, p. 161.

the vaults to which the Court has referred. The faculty will remain in the registry for fifteen days before it issues, and during those fifteen days, if any members of families buried in the church desire to make any special application to the Court, and will communicate with the registrar, I shall be prepared to hear their application in chambers.

1892

RECTOR, &c., OF ST. HELEN'S, BISHOPSGATE, WITH ST. MARY OUTWICH *v.* PARISHIONERS OF SAME.

Solicitor for petitioners: *Wragg.*

C. F. J.

[IN THE COURT OF APPEAL.]

C. A.

1892

March 30.

BAIN *v.* ATTORNEY GENERAL.

Legitimacy—Declaration of—Costs—Legitimacy Declaration Act, 1858 (21 & 22 *Vict. c.* 93), *ss.* 4, 5, 7, 8, 11.

In proceedings under the Legitimacy Declaration Act, 1858, the Court has jurisdiction to order a person who has been cited, and has appeared and opposed the petition, to pay the costs of the petitioner.

Decision of the President, ante, p. 217, affirmed.

ON January 23, 1891, Mary Bain presented a petition asking for a decree declaring that she was the legitimate child of Ralph Usher and Mary Usher, and that a certain marriage between Ralph and Mary Usher was a valid marriage.

The Attorney General entered an appearance and put in an answer traversing all the allegations in the petition. By direction of the Court Ralph Usher was cited, and he entered an appearance on April 9, and on April 27 obtained time to plead. On May 12 he put in an answer denying the allegations in the petition.

Three other children of Ralph Usher, who were admitted to be legitimate children of the marriage, were also cited and appeared, but did not take any active part in the proceedings.

The cause was heard in January and February, 1892, and the President made a declaration of legitimacy, giving liberty to all parties to apply on motion for an order as to costs.

The Attorney General moved that the petitioner and Ralph Usher, or one of them, might be ordered to pay his costs. The

C. A. 1892

BAIN v. ATTORNEY GENERAL.

petitioner moved that Ralph Usher, the intervener, might be ordered to pay her costs.

On March 8, 1892, the President ordered the intervener to pay the petitioner's costs of the proceedings, but refused to make any order as to the costs of the Attorney General. (1)

The intervener appealed from the order that he should pay the petitioner's costs.

Bargrave Deane, and *Simey*, for the intervener. The question is, whether under the Legitimacy Declaration Act of 1858 the Court has jurisdiction to order a person who has been cited to pay costs. Sect. 5 of that Act is inconsistent with such a jurisdiction, for it gives express power to award costs to persons cited. This shews that they are not to be considered parties, for if they were the section would be superfluous. The theory of the Act is that a petitioner resorting to it does so for his own benefit, and is to pay for the advantage he gets. It will be said that if this contention is right the Court will have no power to make a person cited pay the costs of a vexatious opposition; but the Court has power to stop vexatious proceedings.

[LINDLEY, L.J. I doubt whether s. 5 is superfluous. The persons cited are cited by the direction of the Court, and there might be difficulty in ordering a petitioner to pay the costs of parties whom he did not ask to have before the Court.]

It was contended that ss. 4 and 11 give the Court all the same powers as to costs as it has in divorce proceedings; but those powers are only exercised between parties to the proceedings, and a person cited is not a party. The distinction between parties and persons cited is recognised in the Act: see ss. 7, 8. Under the Divorce Act, the only persons who could be brought before the Court were the husband, the wife, and the adulterer; and s. 51 of the Divorce Act could only deal with costs as among them. They were parties in the proper sense of the term. The Legitimacy Declaration Act introduces the citation of other persons; but they are not parties, and s. 51, which was only intended to apply to parties, cannot extend to them. In the Amendment Act, 23 & 24 Vict. c. 144, s. 7, interveners were

(1) Ante, p. 217.

introduced, and special provision is made as to the costs of intervention. The Court is a new Court formed by the Act of 1857, and has no power to award costs further than such power is given by statute. The principle as to costs is laid down by Lord Cranworth in *Clarke* v. *Hart*. (1) The case of *Frederick* v. *Attorney General* (2), is against the existence of the jurisdiction alleged.

Inderwick, *Q.C.*, and *Gatey*, for the petitioner, were not called on.

LINDLEY, L.J. This case raises a question of some importance, and, strange to say, of some novelty. It was raised in *Frederick* v. *Attorney General* (2), but was not decided; so that in 1892 we are called upon to decide for the first time a question as to jurisdiction under an Act of 1858.

The petitioner presented a petition under the Legitimacy Declaration Act, 1858, to have herself declared the legitimate child of Ralph Usher. This petition was served on the Attorney General, and the Court directed Ralph Usher, and his children whose legitimacy was not disputed, to be cited. Ralph Usher was cited; he entered an appearance and obtained time to plead, after which he put in an answer. The petition was heard, with the result that the petitioner obtained the declaration of legitimacy which she sought. The President came to the conclusion that it was right to order Ralph Usher to pay the petitioner's costs of the litigation, and to give no costs to the Attorney General. The question is whether there was jurisdiction to make Ralph Usher pay the petitioner's costs; for if there was, it is admitted that an appeal will not lie.

To see whether there is such jurisdiction, we must look closely into the Act. The important sections are ss. 4, 5, 7, 8, and 11. Sect. 4 enacts that all the provisions of the Divorce Act of 1857 (20 & 21 Vict. c. 85), shall, so far as applicable, extend to proceedings under this Act; and this must be taken in connection with s. 11, which enacts that the Divorce Act and this Act shall be construed together as one Act; so the two Acts are made one as far as they can be read together. Now the Divorce Act,

(1) 6 H. L. C. 633, 667. (2) Law Rep. 3 P. & D. 270.

C. A. 1892

BAIN v. ATTORNEY GENERAL.

Lindley, L.J.

by s. 51, enacts, that "The Court, on the hearing of any writ, proceeding, or petition under this Act, and the House of Lords, on the hearing of any appeal under this Act, may make such order as to costs as to such Court or House respectively may seem just." Under the Divorce Act, therefore, the Court has a discretionary power as to costs. Sect. 5 of the Act of 1858 enacts, that "In all proceedings under this Act the Court shall have full power to award and enforce payment of costs to any persons cited, whether such persons shall or shall not oppose the declaration applied for, in case the said Court shall deem it reasonable that such costs shall be paid." On this the appellant's counsel base an argument; they say that if under s. 51 of the former Act the Court could make orders as to the costs of proceedings under the later Act, this section is superfluous. I am not satisfied with that argument, for reasons which I will give. Sect. 6 directs service of the petition on the Attorney General. Then comes s. 7, which is important: "Where any application is made under this Act to the said Court, such person or persons (if any) besides the said Attorney General, as the Court shall think fit, shall, subject to the rules made under this Act, be cited to see proceedings, or otherwise summoned in such manner as the Court shall direct, and may be permitted to become parties to the proceedings, and oppose the application." The parties to be cited are such as the Court shall think fit. The Court knows nothing about the parties who ought to be cited; it must be put in motion by the petitioner; still, as the parties are not cited by the petitioner, but by the Court, I cannot say that it was unnecessary to provide that the Court should have power to give them costs. Then s. 8 enacts, that "The decree of the said Court shall not in any case prejudice any person unless such person has been cited or made a party to the proceedings, or is the heir-at-law or next-of-kin or other real or personal representative of, or derives title under or through, a person so cited or made a party." This is an exception from s. 2, which provides that, except as afterwards mentioned, the decree shall be binding on all persons, and the result is that all persons who are cited or made parties are bound. A person cited may not care to be an opposing party; but under these clauses, and

s. 51 of the Divorce Act, if a person cited becomes a party and opposes, the Court has full jurisdiction as to costs, quite apart from the question as to the general jurisdiction of the Court over persons who are parties to proceedings before it.

If we look at the right and reason of the thing, any other conclusion than that at which we have arrived would be unjust and unreasonable. A party cited might obtain leave to oppose, and, without any reasonable ground, put the petitioner to heavy expense, and yet, according to the appellant's argument, there would be no jurisdiction to make him pay the costs to which the successful petitioner had been wantonly put. As to the costs incurred before the party was cited, I will put a hypothetical case. Suppose the necessity for taking proceedings to have arisen solely from the person cited having denied the petitioner's legitimacy, is it right that the person cited should not be liable for the costs of those proceedings? The appeal will be dismissed with costs.

BOWEN, L.J. I am of the same opinion. By s. 51 of the Divorce Act, 1857, the Court is clothed with jurisdiction as to the costs of all proceedings under the Act. The Legitimacy Declaration Act, which was passed in the following year, did not create a new court, but by s. 4 extended all the provisions of the Divorce Act to proceedings under the later Act so far as they were applicable. Taking s. 4 of the later Act together with s. 51 of the Divorce Act, it is clear that the Court must have the same power over proceedings under the new Act as over proceedings under the old. That leaves open the question over what persons the Court has jurisdiction. It is contended that the appellant, who has been cited and opposed the petition, is not a party to the proceedings so as to give the Court jurisdiction to make him pay costs, and it is urged that s. 5, which gives the Court power to award costs to any party cited, excludes the power to make him pay costs. But taking ss. 5, 7, and 8 together, I am satisfied that a person cited is not made a party by mere citation, and so needs s. 5 to enable him to get costs; but if he acts as a party, he comes within s. 51 of the Divorce Act. Sect. 5 enables the Court to give costs to a person cited whether he opposes or not. The distinction is reasonable. A party who does

C. A. 1892

BAIN v. ATTORNEY GENERAL.

Bowen, L.J.

not oppose causes no costs to the other party; but one who opposes does. It has been pointed out during the argument that under s. 7 citation is the act of the Court, which is a good reason for a provision enabling the Court to give costs to persons cited. The section says that the persons cited "may be permitted to become parties to the proceedings and oppose the application." Some act, therefore, must be done by them, and then they become parties. Sect. 8 draws the same distinction, for it speaks of a person being "cited or made a party to the proceedings." Why, then, are we not to give effect to the language used, and why are we not to suppose that the legislature intended to give power to inflict costs on a person cited who opposes the petition? Where a Court has an established jurisdiction, and a new proceeding is introduced into it, the case comes within the range of the principle that a court can deal with the costs of persons who have become parties to the proceeding before it. If this had been a new court constituted by the Legitimacy Declaration Act, there would have been a difficulty, for, as a general rule, a new court constituted by statute cannot inflict costs on a defendant or person served, unless the statute authorizes it to do so; but an old court has jurisdiction as to costs over all the parties before it. I am of opinion that the judgment appealed from is correct, though an impression prevailed for some years that costs could not be given—an impression which was strengthened by the abandonment of the application for costs in *Frederick* v. *Attorney General*. (1) That case, however, shews nothing more than that Sir James Hannen regarded the point as doubtful.

KAY, L.J. I am of the same opinion, and for the same reasons; but, as the point is an important one, I will add a few words. The Legitimacy Declaration Act was, I presume, intended to supersede in legitimacy cases the old plan of instituting a suit to perpetuate evidence, and it enables the party applying under it not merely to take evidence, but to obtain a declaration of the Court as to legitimacy. No one can, in the first instance, be made a party except the Attorney General; and the Court then says whether any one else, and who, shall be

(1) Law Rep. 3 P. & D. 270.

cited. It rests with the person cited to decide whether he will be a party. The Act does not make him one merely because he is cited; but if cited he may make himself one. The Court which has to exercise jurisdiction under the Act is the Court for Divorce and Matrimonial Causes, which has general jurisdiction as to the costs of all proceedings under the Divorce Act of 1857, by which it was constituted. Now, the Legitimacy Declaration Act, s. 11, says that the Divorce Act and this Act are to be construed together as one Act, and s. 4 provides that all the provisions of the Divorce Act, so far as they may be applicable, shall extend to applications and proceedings under the later Act. So undoubtedly the Court which is to exercise jurisdiction has full power as to the costs of all proceedings before it. Sect. 7 of the Legitimacy Declaration Act provides that such person or persons (if any) besides the Attorney General, "as the Court shall think fit," shall be cited. A person cited is not made a party by being cited, for the same section says that persons cited "may be permitted to become parties to the proceedings." This shews that before a person cited becomes a party there must be some act of volition on his part; and if he becomes by his own will a party to proceedings before a Court which has full jurisdiction as to costs, he becomes subject to its jurisdiction as regards costs, as well as regards anything else. If he is a party, he is, of course, bound by the decree; but the Act goes further and says, by s. 2, that the decree, "except as hereinafter mentioned," shall be binding on all persons whomsoever. The exception is contained in s. 8, which provides that the decree shall not prejudice any person, "unless such person has been cited or made a party to the proceedings," or derives title under or through a person so cited or made a party. When a party cited makes himself a party he becomes fully subject to the jurisdiction of the Court. The case would have been unarguable but for s. 5, which enacts, that "In all proceedings under this Act the Court shall have full power to award and enforce payment of costs *to* any persons cited, whether such persons shall or shall not oppose the declaration applied for, in case the said Court shall deem it reasonable that such costs shall be paid." This section, it is said, is surplusage

C. A. 1892

BAIN v. ATTORNEY GENERAL.

Kay, L.J.

if the Court already had jurisdiction as to the costs. But it seems to me that there was good reason for the insertion of that section when we look at s. 7. A person cited is not made a party by being cited; but without becoming a party he might, through being cited, incur costs which the Court might think it right to give him. Even if he became a party, it might not follow that the Court would have jurisdiction apart from s. 5 to order the petitioner to pay his costs, for he might have been made a party against the wish of the petitioner. The conferring on the Court an express power to give him costs does not then exclude the idea that he is liable to pay costs. If the case had been more doubtful than it appears to me to be, I should strongly incline to this view on the ground of the serious consequences which would ensue from our holding the opposite view. That party might oppose the petition, and cause heavy costs to the petitioner, and yet, however unreasonable the opposition might be, the Court would have no jurisdiction to order him to pay them. I am not pressed by Mr. Deane's argument that the Court can prevent vexatious proceedings. The Court cannot stop them in time to prevent the mischief. If a party cited takes proceedings which are clearly vexatious, the petitioner might apply to stop them; but, according to Mr. Deane's argument, there would be no jurisdiction to give the petitioner the costs of the application. The reasonable construction of the Act is that adopted by the President, and the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Hickin & Fox, for Simey & Stiff, Sunderland; J. E. & H. Scott, for T. T. Dale, North Shields.*

H. C. J.

[IN THE ARCHES COURT OF CANTERBURY.]

1892
March 25.

NICKALLS AND OTHERS *v.* BRISCOE AND OTHERS.

Ecclesiastical Law—Appeal—Faculty—Stained Glass Window in Chancel—Opposition of Majority of Parishioners—Discretion of Ordinary—Memorials not admissible in Evidence—Costs.

The rector and churchwardens of a parish petitioned the Ordinary for a faculty enabling them to substitute for the east end window (almost entirely glazed with plain glass) then existing in the chancel of their parish church a stained glass memorial window, the cost of which was to be paid for by a parishioner subsequently added as a petitioner. No serious objection was raised to the design of the proposed window; but the grant of the faculty was opposed on the grounds that the majority of the parishioners desired that the existing window should remain unaltered, and that by the erection of the stained glass window the ventilation of the church would suffer, and the chancel be darkened so as to render it inconvenient for public worship. The judge of the Consistory Court of the diocese found that the last two of these grounds of objection were not sustained by the evidence, decreed the faculty to issue as prayed, and condemned the opponents in costs:—

Held, on appeal—

That although it was proposed to place the stained glass window in the chancel, the discretion of the Ordinary as to granting or refusing the faculty was the same as if it had been proposed to place the window in any other part of the church:

That assuming the evidence proved that the majority of the parishioners wished that the existing window should be retained, their wishes in nowise fettered the Ordinary in exercising such discretion:

That the Court below had come to a right conclusion on the evidence, and the decree appealed from must, so far as it directed the faculty to issue, be confirmed:

That the decree must be varied as regards costs, and each party be left to bear their own costs both in the Appellate Court and the Court below.

Peek v. *Trower* (7 P. D. 21) explained.

Decision by the Consistory Court of Rochester that in a contested cause of faculty memorials signed by parishioners asking that the faculty prayed for be not granted, are inadmissible as evidence (see contrà *The Vicar of Tetbury* v. *The Churchwardens and Inhabitants of the Parish of Tetbury*, infra, p. 271, note (2)).

THIS was an appeal from the Consistory Court of Rochester.

On October 29 last, a citation with intimation issued out of the registry of the Court below, reciting that it had been represented to the Chancellor of Rochester (L. T. Dibdin, Esq.), by a petition under the hands of the Rev. W. Briscoe, the rector, and R. Dives and C. W. Cawley, the churchwardens, of the parish of

1892

NICKALLS v. BRISCOE.

Nutfield, Surrey, that J. T. Charlesworth and Harriet Anne, his wife, were desirous of placing in the east end of Nutfield Church a window in memory of their daughter Mary Gray and her four children, such window to be in lieu of the existing window, and to represent, for the purpose of light, bright angels with wings tipped with gold and pink, &c., and that the petitioners had besought the said chancellor to decree a faculty for the purpose aforesaid.

The citation having been duly served, an appearance as opponents was entered for the following inhabitants and ratepayers of the parish of Nutfield—T. Nickalls, J. Hudson, Ellen Fielden, F. E. Perkis, and Clara Woollston—on whose behalf an act or petition objecting to the grant of the faculty was brought in, alleging (inter alia) that the majority of the parishioners of Nutfield were perfectly satisfied with the present window in the east end of Nutfield Church; desired that it should remain in its present condition, and were greatly opposed to the erection of a stained glass window in the east end of the church; that the petition for the faculty was presented without the authority, sanction, or request of the parishioners, and contrary to their desire; and that the stained glass window proposed to be erected would darken the church. These allegations were denied by the petitioners in their answer.

On December 18, upon an application on behalf of J. F. Charlesworth for leave to intervene, an order was made in the Court below that the petition should be amended by inserting his name therein as that of a petitioner.

1892. Jan. 8, 9. On these days the cause was heard on oral evidence before the Chancellor of Rochester. (1)

Bargrave Deane, for the petitioners.

J. C. Priestley, for the respondents.

It appeared from the evidence that the four upper lights of the existing window for which the petitioners asked leave to substitute a stained glass window were filled with old stained glass, but that the remainder of such existing window was glazed with plain glass.

(1) The Court sat in the Lady Chapel of St. Saviour's, Southwark.

1892

NICKALLS v. BRISCOE.

Counsel on behalf of the opponents tendered as evidence in support of their case a memorial purporting to be signed by more than two hundred persons, the genuineness of whose signatures he stated he was in a position to prove. Such memorial, addressed to the Chancellor of Rochester, contained allegations that the memorialists who had signed it were parishioners of Nutfield and members of the congregation of Nutfield parish church; were opposed to the placing of a new window in the east end of that church in lieu of the existing window; and supported the opponents in their opposition to the faculty petitioned for, and concluded with a prayer that the petition in the suit should be dismissed, and the grant of the faculty refused.

[In support of the contention that the memorial in question was admissible in evidence, reference was made to *Peek* v. *Trower* (1) and to *The Vicar of Tetbury* v. *The Churchwardens and Inhabitants of the Same* (2), as instances of contested causes of

(1) 7 P. D. 21. It does not appear from the minutes that any memorial or other statement of opinion signed by parishioners not parties in the cause was admitted in evidence in the case of *Peek* v. *Trower* (7 P. D. 21), either in the Consistory Court of London, where the suit was instituted, or on appeal in the Court of Arches; but on November 24, 1880, counsel, instructed by the solicitors who acted for the only opponent who up to that time had appeared in the suit, applied to the Chancellor of the Diocese of London (Dr. Tristram, Q.C.), for leave for C. S. Hope and forty-eight other persons, parishioners of the united parishes of St. Mary-at-Hill and St. Andrew, Hubbard—the parishes the interior of the parish church of which was proposed to be altered under the faculty prayed for—to intervene in the cause. A petition for leave to so intervene had been previously brought in on their behalf, and the petitioners for the faculty objected to the leave being given; but "the judge, after hearing counsel on both sides, granted leave to the said above-mentioned parties" [the said C. S. Hope and forty-eight other parishioners] to intervene in the cause and to file answers to the petition, and he directed that only one set of costs should be allowed to all the defendants." In accordance with this leave, an appearance for the said parties was duly entered on November 25, 1880, and proxies under their hands and seals brought in; and on December 1, 1880, an answer in the suit was filed on behalf of such interveners, alleging their objections to the alterations proposed, and praying the Court (inter alia) to refuse the faculty prayed for by the petitioners.

(2) *The Vicar of Tetbury* v. *The Churchwardens and Inhabitants of the Same* was a cause of faculty brought in the Consistory Court of Gloucester in 1885 on behalf of the Rev. T. G. Horwood, vicar of the parish church of Tetbury, Gloucestershire, for the purpose of obtaining a confirmatory faculty confirming the removal out of the parish church of

1892

NICKALLS v. BRISCOE.

faculty in which memorials or statements of the opinion of the majority of the parishioners had been brought before the Ecclesiastical Courts.]

Tetbury of two candlesticks and a gilt wood cross which, up to the early part of 1885, had stood in the said church (the two candlesticks on the Communion table and the cross on a retable or super-altar behind and slightly above the Communion table); and on or about that date had been removed into the vestry of the church by the petitioner without the sanction of a faculty.

An appearance in the suit was entered for W. H. Yatman, a parishioner of Tetbury, on whose behalf the Court was prayed to grant a faculty to authorize the candlesticks and cross being replaced in the church.

The cause was heard in the Chapter House of Gloucester Cathedral on August 8, 1885, before the Chancellor of the Diocese of Gloucester (Francis H. Jeune, Esq., Q.C.), when Blakesley appeared for the petitioner, Beaufort for the respondent.

In the course of the hearing Beaufort tendered in evidence a memorial having attached to it more than 100 signatures, and praying that the candlesticks and cross removed out of the church should be replaced there, and contended that the feeling of the parish in favour of the respondent's case could be sufficiently shewn by the memorial so tendered in evidence. It was not disputed that the signatures to the memorial were the signatures of parishioners.

Blakesley objected to the admission of the memorial as evidence of what was the feeling of the parish, and submitted that the only proper mode of bringing to the notice of the Court the opinion of the parishioners was by means of a resolution of the vestry.

The Chancellor admitted the memorial.

On the merits the Chancellor decided that, having regard to the length of time the cross and candlesticks had been in the church and the feeling of the parishioners in favour of their being replaced, a faculty authorizing their being replaced in the church ought to issue; and with reference to the feeling of the parish made the following observations in delivering his judgment: "As regards the feeling of the parishioners, I do not think there can be any doubt that it is substantially all one way. With the exception of the incumbent himself, I do not think it has been shewn that there is any one in the parish in favour of the ornaments not being in the church. The strongest witnesses in favour of the petition hardly went beyond saying that they were indifferent in the matter, and that of the parishioners many did not care which way the question was decided. There appears no strong feeling among any of the parishioners that the ornaments should be taken away. If that had been shewn, it would have had very great weight with the Court; but the feeling among the parishioners in favour of the ornaments remaining in the church appears to be decidedly strong. This is shewn by the memorial admitted in evidence, and the other evidence points in the same direction. . . ." [See also the *Gloucestershire Chronicle* for August 15, 1883.]

Girdlestone, for petitioner.

Paul, Rogers, & Paul, for respondent,

1892

NICKALLS v. BRISCOE.

The Chancellor of Rochester refused to allow the memorial to be put in as evidence, intimating that, assuming the persons who had signed it to be parishioners of Nutfield, the opinion of the majority of the parishioners could not legally be proved by a memorial or statement in a memorial, the proper way of bringing such opinion to the knowledge of the Ordinary being by proof of a resolution of the vestry.

The result of the remainder of the evidence appears from the judgments.

L. T. DIBDIN, ESQ. This is an application by the rector and churchwardens of Nutfield, and by Mr. Charlesworth, a parishioner, for a faculty for a stained glass window at the east end of the chancel. The design, which is produced in Court, was adapted, and the window is to be made by a very well-known firm of artists in glass, and the design was originally from the pencil of an eminent painter. That design has not been seriously objected to by the opponents, and I have before me the evidence of the architect who restored this church that in his opinion the design is suitable to the church and beautiful in itself; and the artist who adapted the design, perhaps not unnaturally, says the same thing. It is described as consisting of bright angels ascending, and the special feature of it was explained by the maker to be the large use made of white or lightly-toned glass, introduced with the special purpose of making the window intercept as little light as possible. The window is intended by Mr. Charlesworth, the donor, as a memorial to a departed daughter, and he desires to insert in the glass, at the foot of the window, her name and the date of her death, and the words "At rest." To such an inscription there can, of course, be no objection. The faculty is opposed by five persons, all persons of property and importance in the place—Mr. Nickalls, Mr. Hudson, Mrs. Fielden, Mr. Perkis, and Mrs. Woollston.

The opposition is upon three grounds—two main grounds: first, that the parishioners generally do not consent; secondly, that the window will darken the chancel to an inconvenient degree—and to that is added, thirdly, that the ventilation of the church will be interfered with.

Let us take the first point first. There was a vestry held on Friday, October 16. Notice for that vestry was given in the usual way upon the church door on October 10, the previous Saturday. The vestry was attended by the rector, the vestry clerk, and by one parishioner, Mr. French. One churchwarden was away from the parish at the time; the other knew of the vestry; in fact, he settled the hour for holding it, but when the time came he was not able to be present. The vestry passed a resolution in favour of the window. No objection is taken to the validity of the vestry in the pleadings; but it is said that I ought not to take this resolution as a test of opinion in the parish, because the parishioners were purposely kept by the rector, and were, in fact, in ignorance that a vestry was about to be held, and so could not attend. The smallness of the attendance will not only not seem remarkable to persons conversant with vestries in general, but it is by no means unusual at Nutfield, as the vestry-book shews.

1892

NICKALLS v. BRISCOE.

The legal notice was given and the object of the vestry fully stated. The length of time during which the notice was on the church door was longer than the law requires, and that does not look like concealment. On the other hand, the rector admits that he did not talk about the matter, and that after the vestry he advised his curate not to introduce the subject in conversation with the parishioners. As the matter has been raised, and may affect the result of this litigation as to costs, I must say that in my opinion the rector discharged his legal duty towards the parish with regard to the vestry. Whether he would not have been wiser to have been more frank with his parishioners is a question to which this unfortunate litigation suggests an answer. I observe in the act on petition, at the end of the eighth paragraph, that it is said, "That it having been the intention of the petitioners or some or one of them to keep the said vestry meeting as secret as possible." With regard to the churchwardens, there is no hint of evidence that they did anything to keep the vestry meeting secret; and with regard to the rector, I think that what has been proved in evidence is not sufficient to justify that paragraph in the pleadings.

The vote of the vestry is the usual and proper way of evidencing the opinion of the parish; but there may be circumstances which deprive it of its force. In my opinion, it is so here. Although if there had been no subsequent events I should certainly have accepted the resolution of the vestry of October 16, it would be idle, in the light of what has happened since, to take it as a test of the real view of the parishioners. Plainly, the parish is not unanimous in favour of the window. Plainly, there are at least several of the parishioners who, had they known of the vestry—though, as a matter of fact, they did not know of it—would have attended and opposed.

But have I in the evidence any other test of the opinion of the parish? What happened was this. Mr. Nickalls and the four other opponents convened, soon after the vestry, a meeting, the public notice of which states it was a meeting to protest against the window. Mr. Nickalls, in his evidence, called it an indignation meeting, and, having read the newspaper report which is admitted between the parties in the case, I think Mr. Nickalls' description is very accurate in calling it an indignation meeting, for it was very much so indeed. An adverse resolution was passed at the meeting by above twenty votes to two. About thirty, or rather more than thirty persons, were present at the meeting; whether they were all parishioners or not cannot now be ascertained; but it has come out in evidence that certainly all were not ratepayers; that three or four of one family were there, and one or two of another, and so on, and that at least twelve of the majority of twenty seem to have been composed of the opponents before the Court and of members of their families and dependents.

Now, I note that in the parish of Nutfield there are 172 householders, and a very much larger population of more than 800. That being the case, I cannot take the resolution passed at that meeting of October 30 as an indication of the sense of the parish. It is entitled to weight, as shewing that the vestry attended by one parishioner was not an adequate representation of the opinion of the whole parish; but it is not anything else than a meeting called to protest against the window, and cannot therefore give any indication whatever of how much support for the window there may be in the parish. Sensible

people usually keep away from a meeting held to protest against something of which they are in favour.

In the evidence that has been called before me, the rector, churchwardens, and parish clerk, all say that they think the feeling is in the main in favour of the window, or, at any rate, would be in favour of the window if, as I think the rector expressed it, they were left alone. On the other hand, Mr. Nickalls and, I think, all the opponents and the other witnesses called by them, except Mrs. Fielden, who expressed no opinion as to the feeling of the parish, say that their view—and some of them made inquiries—is that the prevailing opinion is against the window.

In addition to that, a memorial has been tendered in evidence—that is to say, a petition signed by parishioners, and perhaps by others—asking that this faculty may be refused, and intended to bring to the mind of the Court the opinion of those who signed the memorial. I have rejected that memorial. In my opinion, the signature of a person to a memorial is not a proper or an admissible way of bringing his view before the Court. The Court cannot know in such cases what representations were made or what influence was exerted, or whether the person signing understood to what he was putting his name. All Courts of Justice require the best evidence of any fact which is to be proved; and where a man can be produced as a witness, or, being disabled, can be examined on commission, it seems to me that his signature to a memorial, even if the handwriting be proved, is not the best mode of bringing his views before the Court. The admission of such memorials may do serious injustice to the other side, who lose the opportunity of testing the evidence by cross-examination which, in the case of a witness, would exist.

Memorials of this sort are frequently tendered in evidence in faculty cases. I have more than once rejected them in this Court, and in the Consistory of London, and in some other of the Diocesan Courts, the same course has been, to my knowledge, taken. Mr. Priestley tells me he has heard of a case where such a memorial was, after argument, admitted, but it is not reported. It seems to me that the proper course for an opponent who wishes to impugn the vote of a vestry, not as technically invalid, but as inapt for the purpose of expressing the opinion of the parish, is to ask for a fresh vestry, supporting his application by evidence of a sufficient number of parishioners to shew primâ facie that they are against the resolution made by the vestry already held.

The opponents in this case since the institution of this suit asked the rector and churchwardens for a fresh vestry; but the request was refused. If, in the view that I take of this case, the mere wishes of the parish were decisive, or almost decisive, it would be my duty to direct a fresh vestry to be held; for although I have enough before me to deprive the vote of the vestry of all weight, I have nothing upon which I can safely rely to shew whether—if the parish were fairly polled—the majority of those entitled to vote would be for or against the window.

But now I come to the real point in this case: What weight ought to be attached to the wishes or mere will or whim of the parishioners? Mr. Priestley argued that the will of the parishioners is supreme, and that in this case there is no difference between the chancel and the body of the church. He cites *Peek* v. *Trower* (7 P. D. 21), and he points out that the alterations proposed in that case affected the chancel as well as the church. But that was a very different

1892

NICKALLS v. BRISCOE.

case to this. In the first place, the alterations were alterations of the old-fashioned fittings of an old-fashioned church, so as to alter the church into what I may call a new-fashioned church; there was the cutting down of pews. Alterations of that kind once made are obviously irrevocable; but in the present case the window is not an alteration but an addition, and an addition which can be removed if subsequent generations—as has been suggested in argument—"love" a clear glass window. The case of *Peek* v. *Trower* (7 P. D. 21) does not really touch the point in this case. There, although the alterations might to some extent affect the chancel, the main matter was as to the pews in the nave; and there the church was in the City of London, the well-known custom of which is that the parishioners repair the chancel, and therefore the whole church—chancel and nave—are in the same position as the nave in an ordinary parish church.

Now there are other cases which I refer to in order that it should not be supposed that I have omitted to consider them. There is the case of *The Vicar and Churchwardens of Tottenham* v. *Venn* (Law Rep. 4 A. & E. 221). That was a case with regard to the parish church of Tottenham, and it was a petition by the incumbent, and was opposed by the parishioners, and successfully opposed to some extent; but in that church there was no chancel. The object of the petitioners was to lengthen the nave and erect a chancel; so that there there was no chancel in which the vicar had the rights which the rector of Nutfield has in his chancel.

Then there is another case of *Evans* v. *Slack* (38 L. J. (Eccl.) 38). That was a case before the Consistory Court of London with reference to the church of St. Mary-in-the-Strand, and there again the rector was in conflict with his parishioners. It is a case in which the chancel was involved. But how? Not as to the fabric, but as to the fittings. The fittings of the chancel—the Communion table, rails, and so on—belong to the parish, who have to keep them in repair and provide them and are responsible for them. It is quite common knowledge that the parishioners have exactly the same rights as to the fittings of the chancel as they have as to the fittings in any other part of the church. But this is a case of a window, not a fitting at all, but part of the fabric, and I think none of those cases help the contention that is here put forward, that the parishioners have the same large and almost unlimited rights as to matters of mere discretion, fancy, and taste, in the chancel, that they have in the church.

I think the case is really governed by—at any rate the case that really applies to it is—the case of *Rich* v. *Bushnell* (4 Hagg. Eccl. 164). That was a case of a vault and tablet—that is to say, a tablet on the wall and a vault under the floor—and the vicar was objecting to the lay rector digging a vault and putting up a tablet, on the ground that he (the vicar) was entitled to a fee, and had an absolute veto unless that fee was paid. That was the main contention, but incidentally the question of the rights of the parishioners came up—they were cited; and what Sir John Nicholl said there was this: "Though the freehold of the chancel may be in the rector, lay or spiritual, as by a sort of legal fiction, the freehold of the church is in the incumbent, and although the burthen of repairing the chancel may rest on such rector, yet the use of it belongs to the parishioners"—for what? Not the unlimited use, but "for the decent and convenient celebration of the Holy Communion and the solemniza-

tion of marriage; and, by the rubric, that portion of the Communion Service which forms a part of the regular Morning Service is directed to be read from the Communion table, which is appointed to stand in the body of the church or in the chancel."

That seems to give the principle which is applicable to this case. The freehold of the chancel is in the rector, and he is liable to repair it, and not the parish. The right which the parishioners have is a right for certain purposes, purposes defined, generally defined (there may be others), in the sentence which I have read from Sir John Nicholls' judgment in the last-mentioned case. They are also responsible, as I have said, for the fittings in the chancel, and are entitled to access to the chancel, with reference to those fittings, as, for instance, for the repair of the Communion table.

That limits and defines, in my opinion, the rights of the parishioners in the chancel. They are entitled to notice of any application for a faculty to alter the fabric in order to see whether any of those rights are in any way jeopardized or affected by what is proposed; and in this case they have been cited, and properly cited. But their objection must be founded upon some such ground as I have stated—unless, indeed, they allege that what is proposed is illegal. Directly the parishioners raise a question as to the legality of what is sought to be done, the Court has nothing else to do but decide according to the law. But I have not heard any suggestion that there is anything in the window which is illegal; therefore it comes back to the question of discretion on the part of those who have a right to exercise it.

What are the reasons given in this case why this faculty should not be granted?

The first one which I have dealt with is the mere will of the parishioners. That, for the reasons I have stated, I think, is not sufficient.

But then the opponents give another reason, which, if established, is a proper ground, having regard to the rights of parishioners as I have stated them, and that is, that the window if put in will so darken the chancel as to render it inconvenient for public worship.

In the first place, I notice that the parishioners do not now sit in the chancel at all. It is occupied exclusively by the choir and the clergy. I do not attach any great weight to that, because, although they do not sit there now, they might again hereafter; but still it is entitled to some weight. The windows in the chancel are these. There is the east window, which is a fairly large window for a chancel of this size. There is nothing very remarkable about it one way or the other. The dimensions are given in evidence. On the south side of the chancel there are three windows: first, immediately west of the east side, there is a two-light window of considerable size, which has plain glass in it; then, further westward, a very small and very narrow lancet window filled with dark stained glass; and further westward again a two-light window, which is also filled with somewhat dark stained glass. On the north side, immediately opposite the clear window on the south side, there is another almost identical window of two lights, which is filled with clear glass.

The evidence which has been given as to the condition of the light and the windows is very conflicting, and if I had to rely upon that evidence I should be in very great difficulty indeed. I cannot blame the witnesses on either side, because no one can have had any experience in litigation without seeing how

1892

NICKALLS v. BRISCOE.

much people's views as to facts are unconsciously coloured by the opinion which they happen to entertain on the particular matter in litigation. But I have seen the church myself. I examined it very carefully, and spent some time in it, and as to the condition of the light in the chancel I have no manner of doubt whatever. The body of the church is a very light church. The chancel is not nearly so light as the body of the church, but it is not a dark chancel—not nearly so dark as most London churches are in every part. I have tested it by reading, both in the chancel and in the nave, small print, and I am satisfied that the view I have stated is the right view as to the light of the church.

I have to consider now, if the window is inserted, to what extent it will darken the church. Some of the petitioners' witnesses state that the insertion of stained glass will make the chancel lighter. I cannot bring myself to believe that. It is impossible. Of course it will make it darker; but the question is to what extent it will make it darker. Having listened to the evidence of the gentleman designing the window, and the evidence of the architect, to which I am bound to attach very much more value than to the other evidence—for instance, that of a young lady who looks at the sketch for the first time here in Court—I am satisfied, if the window is put in, that it will not so darken the chancel as to render necessary artificial light, or render it inconvenient for service, or for Holy Communion, or for the solemnization of marriage. I think that this case shews the advantage of personal inspection of churches in these faculty cases, because it would have been absolutely impossible for me to form any opinion whatever in my own mind if I had not actually seen the church itself.

Then I must mention, to shew I have not forgotten it, the question raised at the bar as to ventilation. I think, speaking with all deference, that that is a frivolous point. At present it seems there is a ventilator in the east window. A ventilator could, if it were wished, be put in a coloured window. Probably the parishioners would prefer it was not done, because any one who has had to consider the ventilation of churches cannot be ignorant that it is not the best way, or the necessary way, to ventilate a church. The proper way is by ventilation under the floors if possible (often impossible in a country church) and by roof ventilation.

In the minds of some of the opponents it is plain to me there lurks a misgiving—an objection, not to the window, but to what it is feared the window will lead. I have listened to a good deal of evidence, rather sad to listen to, on this subject, and the conclusion I come to is, that that rather ill-defined but no doubt real apprehension is an ill-founded one, although it will probably explain to the next generation of Nutfield people what I think they will be very much at a loss to understand, namely, why there should have been, at the end of the nineteenth century, serious objection to the introduction into their ancient and interesting church of a stained-glass window, in every way worthy of the position which it is designed to occupy.

I therefore grant the faculty.

The question remains as to the costs. I have had some doubt; but I do not think that the action of the rector, against whom alone any case has been attempted to be made, has been such that I ought to abstain from ordering the respondents to pay the costs of, and occasioned by, the opposition in this

case. Those costs will be the whole taxed costs, except the sum of 25*s.*, which the faculty would have cost if it had not been opposed; and except, further, the cost of a summons before me for leave to amend—it took another form, but it culminated in the event in this, that it was an application for leave to amend the petition by adding Mr. Charlesworth as a petitioner. That was a concession made to the petitioners. He might have been made a petitioner in the first instance, and I do not think it would be right for the respondents to have to pay any costs of that amendment.

From the decree entered in accordance with this judgment the opponents appealed to the Court of Arches, and the petitioners in the Court below having appeared as respondents, the appeal was heard before the Dean of Arches (the Right Honourable Lord Penzance) on March 25 last.

Dr. Tristram, Q.C., and *J. C. Priestley*, for the appellants. The judge of the Court below ought, in the exercise of his discretion, to have refused to grant the faculty. In the first place he did not give proper weight to the opinion of the majority of the parishioners—that, as a matter of taste, the existing east end window in Nutfield Church ought to be retained; and, secondly, the burden of shewing that the alteration desired by the petitioners was one that ought to be made, and particularly that the chancel would not be materially darkened by the stained window proposed, is cast upon the petitioners (*Evans* v. *Slack* (1)), and has not been discharged by them. That the majority of the parishioners wish the existing window retained is clearly proved by the evidence of the witnesses who have been called, though a memorial tendered for the purpose of strengthening that evidence, and bringing before the Court the opinion of the majority of the parishioners, as was done in *Peek* v. *Trower* (2), was rejected in the Court below.

[LORD PENZANCE. It may well be that memorials signed by parishioners may be admitted in uncontested faculty cases, whilst they may not be evidence in opposed cases. The minute in the registrar's book, on the hearing of the appeal in *Peek* v. *Trower* (2), does not allude to any memorial having been admitted in evidence by the ruling of this Court; but it does appear from that

(1) 38 L. J. (Ecc.) 38.

(2) 7 P. D. 21; see ante, p. 271, note (1).

1892

NICKALLS v. BRISCOE.

minute that, whatever evidence was admitted in this Court on the appeal, was so admitted the respondents not objecting thereto. (1) You may, however, argue the present case on the assumption that the majority of the parishioners are against the alteration proposed by the petitioners.]

This being so, and it being also clear, since the cases of *Rich* v. *Bushnell* (2) and *Griffin* v. *Dighton* (3), that the Ordinary has the same jurisdiction to exercise with respect to an alteration such as is proposed here, whether such alteration be in the chancel or elsewhere in the church, the Court ought to follow its decision in *Peek* v. *Trower* (4), and hold that the proposed alteration being in a matter of taste and fancy, it will not, in the absence of a clearly-expressed opinion in favour of such alteration by a sufficient body of the parishioners, sanction any interference with the existing arrangement of the church.

[LORD PENZANCE. I do not think the case of *Peek* v. *Trower* (5) throws any light on what the Court has to do in this case.]

Whatever may be the result of the appeal on the merits, the Court ought to take into consideration that the petitioners are asking for an indulgence, and to vary so much of the decree appealed from as condemns the opponents in costs, leaving each party to bear their own costs both in this Court and in the Court below. Such an order as to the costs incurred in the Court

(1) The portion of the minute referred to relating to the admission and rejection of evidence is as follows:—"*Peek* v. *Trower*. October 22, 1881. Appellants' solicitor moved for leave to be allowed to adduce evidence as to the number of the united parishes according to the recent census. The judge having heard counsel on behalf of the appellants, and counsel on behalf of the respondents not objecting thereto, admitted the same; whereupon the solicitor for the appellants produced and put in evidence an official extract of the census for the said united parishes. Appellants' solicitor then moved for leave to be allowed to adduce evidence as to the number of persons who had attended the service of the said church of Mary-at-Hill since the hearing in the Court below, and also to put in evidence the Report of the Royal Commission on Public Charities of the City of London. The judge, having heard counsel on both sides, rejected the evidence."

(2) 4 Hagg. Eccl. 164.

(3) 5 B. & S. 93, 106; 33 L. J. (Q.B.) 29; on appeal, 33 L. J. (Q.B.) 181.

(4) 7 P. D. 21, at p. 30.

(5) 7 P. D. 21; see ante, p. 271, note (1).

appealed from was made by this Court in the case of *Crisp* v. *Martin* (1), although the appeal on the merits was unsuccessful. [On the question of costs, they also referred to *Burnell* v. *Jenkins* (2); *Groves and Wright* v. *The Rector of Hornsey.* (3)]

Blakesley, and *A. B. Kempe*, for the respondents. The rector has in this, as in most country parishes, especial rights with respect to the chancel, as, for instance, the freehold of it is vested in him and no alteration in its fabric can be made without his consent: *Rich* v. *Bushnell* (4); and, admitting to the full the right of the Ordinary to grant or refuse the faculty, the fact that the proposed alteration is an alteration to a window in the chancel, and is desired by the rector on reasonable grounds, he indeed being one of the respondents, ought to turn the scale in favour of the faculty issuing. The respondents admit that the burden of proving that the faculty ought to issue lies on them; but they contend that they have discharged this burden, and have shewn that the proposed window will be an improvement, and that the objection that the proposed alteration will materially darken either the chancel or the body of the church—the only objection of any moment—is unfounded. The decree appealed from is therefore right, and ought to be affirmed; for assuming, contrary to what the respondents contend to be the fact, that the majority of the parishioners are of opinion that the present window should be retained, the Court will attach no weight to such an opinion where, as here, it is not supported on any good ground. Although the rector has an absolute veto where alterations in a chancel repairable by him are proposed without his consent: *Maidman* v. *Malpas* (5); *Rich* v. *Bushnell* (4); the parishioners have no absolute veto with respect to alterations whether in the chancel or the body of the church: *Groves and Wright* v. *The Rector of Hornsey.* (6) If necessary, the counsel for the respondents are prepared to argue that the judge of the Court below acted rightly in rejecting the memorial tendered in evidence before him.

[They were stopped.]

Tristram, Q.C., in reply.

(1) 2 P. D. 15.
(2) 2 Phillim. 391, 402.
(3) 1 Hagg. Cons. 188, 197.
(4) 4 Hagg. Eccl. 164.
(5) 1 Hagg. Cons. 205, 211.
(6) 1 Hagg. Cons. 188, 189.

1892

NICKALLS v. BRISCOE.

LORD PENZANCE. It is not difficult for the Court to understand the feelings which have prompted this appeal. But it cannot prevail. Mr. Charlesworth, one of the promovents, has offered at his own expense to replace the common glass with which the east window of the chancel of the church at Nutfield is glazed by a very handsome and artistic window of stained glass, the appropriate design and good taste of which no one has been able to question. But his offer has met with a vehement opposition on the part of several of the most opulent and influential of his fellow-parishioners. There have, it appears, been long-standing differences between the parties, resulting in a general feeling of antagonism, such that anything proposed on the one side would be likely to meet with opposition on the other. The learned counsel on both sides have very wisely and properly avoided as much as possible all reference to the troubles and discord of the past, and the Court will do well to follow their example. It has transpired in the course of the evidence that Mr. Charlesworth is suspected in some quarters of a leaning towards those innovations in the ceremonies of the Church which pass by the name of ritualistic practices. There is no pretence whatever for connecting the design of the window in question with any such opinions, nor has any one been able to assert the contrary. As to Mr. Charlesworth's religious opinions or wishes, he was called as a witness and cross-examined, and if he had been asked his religious opinions he would hardly have desired to conceal them. But, whether or no, he was not asked a single question on the subject, and there is nothing before the Court from which it can conclude that he has any indirect motive for the offer which he has made. "I do not object to the window as a window; but I am afraid of what will follow," said one of the appellants' witnesses; and, "I like the window; but I am afraid of what will follow," said another. But they do not offer to the Court any substantial ground for these fears. I come, therefore, to the principal objection that has been made to the grant of this faculty. It is said that the majority in the parish object to the proposed alteration. I will assume that this was established by the evidence for the purpose of argument; but it constitutes no answer to the present appli-

cation. The notion that the matter here in question should be decided by the wishes of the majority of the parishioners proceeds, in my opinion, upon an entirely mistaken view of the law. The appellants have put forward their attachment to the old church and its interesting connection with times gone by; but they seem to forget that the sacred edifice has a future as well as a past. It belongs not to any one generation, nor are its interests and condition the exclusive care of those who inhabit the parish at any one period of time. It is in entire conformity with this aspect of the parish church that the law has forbidden any structural alterations to be made in it, save those which are approved by a disinterested authority in the person of the Ordinary, whose deputed discretion and judgment we are here to exercise to-day. That the grant or refusal of a faculty is a matter which lies in the judicial discretion of the bishop, the learned counsel for the appellants do not deny; but if a majority of parishioners is to settle the question, what, it may be asked, becomes of this discretion? I am far from saying that the wishes of the parishioners have no place in that balance of opposing considerations which is involved in the exercise of a judicial discretion—but the weight to be given to them depends upon many and various circumstances. In the first place, the opinions of the parish, to be of much value, should be opinions formed in relation to the proposed alteration itself and its effect on the convenience or beauty of the church, and not, as in the present case, upon the motives or objects of those who propose it. A divided opinion, moreover, reduces its value very much. Is the proposed alteration an improvement? Does it render the edifice more commodious or more fit for its purposes? Or, if not this, does it add to its architectural beauty or suitable decoration? If the proposed alteration cannot be supported upon any of these grounds, those who propose it should at least be able to assert that it is supported by a very general desire on the part of the parishioners.

And this is all that was meant to be conveyed by the Court in the case of *Peek* v. *Trower* (1), upon which the learned counsel for the appellants have relied so largely as an authority for the

(1) 7 P. D. 21.

1892

NICKALLS v. BRISCOE.

Lord Penzance.

proposition that the consent of the majority in the parish is almost a necessary condition to the grant of the faculty. That case was an application for a faculty to authorize a structural change in the entire body of the church for which no justifiable reason could be offered; it was an alteration which added nothing to the comfort or convenience of the congregation, and which, on the other hand, was fatal to a certain unity of architectural design which was obvious in the structure of the church. The remarks of the Court as to the general desire of the parishioners were in express terms confined to a case like the one then in hand, where the proposed alteration could not be supported on its own merits as an improvement from any point of view. It is the very reverse in the present case. It is because this window is in itself a fitting architectural and decorative improvement to the chancel; because it is entirely free from the taint of superstitious or idolatrous uses, and because it has no doctrinal significance, that I hold it to be a distinctly advantageous addition to the present building, and that the sanction of the Ordinary to its erection ought not to be refused.

If, indeed, it could have been established that this window would materially darken the chancel (although even then it would be a question of degree), such a state of things might constitute a substantial objection to the grant. But I am satisfied on the evidence, as indeed was the learned Chancellor, who had himself inspected the church, that there is no fear of any such result.

The conduct of the rector has been impugned; but I can see no fault to find with it. What he did was done, I believe, with the best intentions, and with a desire to avoid the breaking out afresh of controversies which had caused disunion among his congregation in the past. The most that can be said is that he would have acted more wisely if he had taken less pains to avoid these troubles, and he would have done less to sow suspicions of sinister motives in minds only too ready to entertain them.

Some remarks were made in the Court below in reference to the legal aspect of the case, resulting from the fact that this window is to be placed in the chancel. The views which I have expressed apply equally to all parts of the church, and are

1892

NICKALLS v. BRISCOE.

Lord Penzance.

independent of any consideration which may apply to the chancel alone.

The appeal must, therefore, be dismissed. But now there is something to be said upon the subject of costs. I confess, I think, that when a gentleman comes forward—strongly in antagonism to a large number of his fellow-parishioners—to make an alteration of this character, however beneficial it may be to the church, he ought to be prepared substantially to bear the expenses of the proceedings. And no one can deny that it was a very fitting case for those who were of a contrary opinion to bring their view before the Court; and, therefore, I certainly should not be prepared to condemn the appellants in the costs of this appeal; and I think, upon the whole, that it would be more just that they should not pay the costs in the Court below. Therefore, to that extent, I vary the decree of the Court below.

Solicitor for appellants: *Frank Cotton.*

Proctor for respondents: *Heales.*

C. F. J.

[IN THE COURT OF APPEAL.]

C. A.

1892

Feb. 9, 10, 15; *May* 7.

TURNER *v.* MERSEY DOCKS AND HARBOUR BOARD. THE ZETA.

Admiralty—Damage to Ship—Negligence of Dock Official—County Court—Jurisdiction — The County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *s.* 3—*The County Courts Admiralty Jurisdiction Amendment Act*, 1869 (32 & 33 *Vict. c.* 51), *s.* 4—*Costs.*

By the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 3: "Any county court having Admiralty jurisdiction shall have jurisdiction . . . to try . . . the following causes . . . (3) as to any claim for damage . . . by collision . . . in which the amount claimed does not exceed three hundred pounds."

By the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), s. 4: "The third section of the County Courts Admiralty Jurisdiction Act, 1868, shall extend and apply to all claims for damage to ships whether by collision or otherwise, when the amount claimed does not exceed three hundred pounds."

The plaintiffs brought an action, in personam, in the Probate, Divorce, and Admiralty Division (Admiralty) of the High Court of Justice, against a dock company for injuries, to the amount of 221*l.* 4*s.* 6*d.*, to their steamship, by a collision with the dock wall, occasioned by the negligence of the servants of

C. A.
1892
TURNER
v.
MERSEY DOCKS AND HARBOUR BOARD.
THE ZETA.

the dock company. The Court found the dock company liable, but the President refused the plaintiffs their costs on the ground that the action ought to have been brought in the county court exercising Admiralty jurisdiction where the cause of action arose.

On appeal against the disallowance of the costs :—

Held, by the majority of the Court of Appeal (Lord Esher, M.R., and Lopes, L.J.)—reversing the decision of the President, [1891] P. 216—that the costs could not be disallowed on that ground, as neither the Admiralty Court, or the Admiralty side of a county court, had jurisdiction to entertain such an action, which could only have been tried by a judge of the Probate, Divorce, and Admiralty Division, sitting as a judge of the High Court :—

Held, by Fry, L.J., that the costs were properly disallowed, as the Admiralty Court had jurisdiction, and the combined effect of s. 3 of the Act of 1868, and s. 4 of the Act of 1869 was to give the county court similar jurisdiction, but limited in amount.

APPEAL by the plaintiffs, against a decision of the President (Sir Charles Butt) refusing them their costs, on the ground that the action might have been brought in a county court exercising Admiralty jurisdiction.

The facts, so far as material on the question of costs, are set out in the report of the case in the Court below (1), and were shortly that :—

An action in personam was brought in the Probate, Divorce, and Admiralty Division (Admiralty) by William H. Turner on behalf of himself and all others, the owners of the screw steamer *Zeta*, against the Mersey Docks and Harbour Board, for negligence, causing injury to their steamship by collision with the wall of the pier-head, on the east side of the entrance to the Nelson Dock, Liverpool.

The vessel was at the time the accident occurred proceeding from the Stanley Dock into the Sandon Graving Docks under the orders of the dock officials, in the employment of the defendants, and two of the four blades of her propeller were broken by striking against the wall whilst her machinery was in motion. The particulars furnished to the defendants put the damages (including 60*l.* demurrage) at 221*l.* 4*s.* 6*d.*

On February 27, 1891, the action was tried by the President (Sir Charles Butt), with two of the Elder Brethren of the Trinity House as assessors, and the Court, acting on the advice of the

(1) [1891] P. 216.

Trinity masters, held that the accident was due to the defendants' servants negligently omitting to require a bow rope to be made fast to the entrance of the next dock before the vessel left the entrance to the Nelson Dock.

Judgment was therefore pronounced in favour of the plaintiffs, and the damages referred to the registrar and merchants in the usual way; but the learned judge refused the plaintiffs the costs of the action on the ground that the combined effect of s. 3 of the County Courts Admiralty Jurisdiction Act, 1868 (1) and s. 4 of the County Courts Admiralty Jurisdiction Amendment Act, 1869 (2) was to give the county court jurisdiction, and therefore the action ought to have been brought in the county court exercising Admiralty jurisdiction in Liverpool, where the cause of action arose.

On appeal on the question of costs.

1892. Feb. 9, 10. *Barnes, Q.C.*, and *Joseph Walton*, for the appellants (plaintiffs). The sole question is, whether the learned judge in the Court below improperly refused the plaintiffs their costs.

[LORD ESHER, M.R. Can you appeal as to costs only?]

Yes, because in the words of James, L.J., in *The City of Manchester* (3), "the learned judge did not deal with the costs in this case as being within his judicial discretion," in which case no appeal would lie: Judicature Act, 1873, s. 49; but the costs were disallowed on the ground that the action ought to have been brought in a county court. The amount claimed as damages by the plaintiffs precluded their bringing the action on the common law side of the county court, though it was within the statutory limit of the Admiralty jurisdiction and the question

(1) The County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 3: "Any county court having Admiralty jurisdiction shall have jurisdiction . . . to try . . . the following causes. . . .

"(3.) As to any claim for damage . . . . by collision . . . . in which the amount claimed does not exceed three hundred pounds."

(2) The County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), s. 4: "The third section of the County Courts Admiralty Jurisdiction Act, 1868, shall extend and apply to all claims for damage to ships, whether by collision or otherwise, when the amount claimed does not exceed three hundred pounds."

(3) 5 P. D. 221, at p. 223.

C. A. 1892

TURNER v. MERSEY DOCKS AND HARBOUR BOARD. THE ZETA.

is, whether the Liverpool county court, on its Admiralty side, had jurisdiction to try this action. It is submitted that on the true construction of the Acts conferring Admiralty jurisdiction on county courts the Liverpool County Court had no such jurisdiction.

[LORD ESHER, M.R. The appeal will be heard.]

The plaintiffs, the owners of the *Zeta*, sued the defendants in personam for negligence. The right of action arose out of the contractual relationship existing between the parties by the payment of dues by the plaintiffs to the defendants. It is contended by the plaintiffs that under such circumstances, damage done to a ship by the act or omission of a servant of the defendants—the piermaster, who was controlling the movements of the vessel within the defendants' dock under the statutory powers conferred on the Mersey Docks and Harbour Board—does not fall within the meaning of the words "damage by collision" in sub-s. (3) of s. 3 of the County Courts Admiralty Juisdiction Act, 1868, or "damage to ships whether by collision or otherwise" in s. 4 of the County Courts Admiralty Jurisdiction Amendment Act, 1869.

In *Reg.* v. *Judge of City of London Court* (1), it was held that these two Acts (except with regard to charterparties) confer no greater jurisdiction on county courts than that which was possessed by the Admiralty Court, and it is submitted that the Admiralty Court had no jurisdiction to entertain this suit, which is a common law action, and has been tried by the judge of the Admiralty Division sitting as a judge of the High Court. The cause of action arose in the body of a county, the borough of Liverpool, and the Court of Admiralty, therefore, had no original jurisdiction. In certain cases specified in s. 6 of the Admiralty Court Act, 1840 (3 & 4 Vict. c. 65), the jurisdiction was extended so as to enable the Court to adjudicate upon claims where the ship was within the body of a county, but there was no remedy in personam until in 1854, by s. 13 of the 17 & 18 Vict. c. 78, the obsolete proceedings in personam were revived, and the Admiralty Court had power to proceed by way of monition; but the effect of these two Acts was only to enable the jurisdiction

(1) [1892] 1 Q. B. 273.

to be exercised in the body of a county, and to affect the form of procedure, and did not give any greater jurisdiction in respect of subject-matter than the Court had before.

Under s. 7 of the Admiralty Court Act, 1861 (24 Vict. c. 10), jurisdiction was given over any claim for damage done by any ship; but these general words have a limited meaning, for in *The Urania* (1), the question of the extension of the jurisdiction was expressly raised, and Dr. Lushington held that the Act did not empower him to allow a citation in personam to issue against a pilot by whose alleged incapacity, whilst in charge of the vessel, damage had been done to another vessel.

So again the words "damage to ships whether by collision or otherwise," in s. 4 of 32 & 33 Vict. c. 51, have a limited meaning, for in *Everard* v. *Kendall* (2), a prohibition issued to a county court on the ground that the Admiralty Court had no jurisdiction over a collision in the Thames between two barges propelled by oars only, and that the Admiralty jurisdiction of a county court was not more extensive.

The cases of *The Malvina* (3), *The Excelsior* (4), *The Sylph* (5), *The Uhla* (6), *The Sinquasi* (7), and *The Albert Edward* (8), are all suits against the ship for damage alleged to have been done by her, and may be regarded as falling under s. 7 of the Admiralty Court Act, 1861; but no case can be found in which the Admiralty Court has entertained a suit of the nature now before the Court.

The effect of s. 35 of the same Act (Admiralty Court Act, 1861), giving the Admiralty Court jurisdiction either by proceedings in rem or in personam is only to enable proceedings in personam to be taken where the case is an Admiralty suit, so that proceedings in rem would have lain—see *The Alexandria* (9)—that is, it gave jurisdiction against the ship, or against the owners or persons identified in interest with the ship. The cases of *The Industrie* (10), and *The Sisters* (11), in which there was no actual

(1) 10 W. R. 97.
(2) Law Rep. 5 C. P. 428.
(3) Lush. 493.
(4) Law Rep. 2 A. & E. 268.
(5) Law Rep. 2 A. & E. 24.
(6) Law Rep. 2 A. & E. 29, n.
(7) 5 P. D. 241.
(8) 44 L. J. (Adm.) 49.
(9) Law Rep. 3 A. & E. 574.
(10) Law Rep. 3 A. & E. 303.
(11) 1 P. D. 117.

C. A. 1892

TURNER v. MERSEY DOCKS AND HARBOUR BOARD. THE ZETA.

collision between the ship doing the damage, and the ship to which damage was done, do not affect the contention, as the damage resulted from the attempt to avoid a collision between two ships.

If such a case as the present is to be treated as an Admiralty cause, the defendants would be debarred from setting up contributory negligence as a complete defence, and a difficulty would also arise as to apportioning the damages, if the Admiralty rule as to recovering a moiety is to be applied.

Sect. 21 of the Act 31 & 32 Vict. c. 71, conferring Admiralty jurisdiction on county courts, lays down rules as to the county court in which proceedings are to be commenced, but the proceedings contemplated are against the ship or her owners, and the selection of the county court depends on the ship being within the district at the time, or the owner residing within it, but at the time this suit was instituted, the ship was on the high seas and the owners in London, therefore the Liverpool County Court was not the proper forum.

It is submitted that no county court had jurisdiction in this case, as the amount claimed was over 50*l.*, and it was not an Admiralty action.

Carver and *A. Hyslop Maxwell*, for the respondents (defendants). The suggested difficulty as to s. 21 of the Act conferring Admiralty jurisdiction on county courts (31 & 32 Vict. c. 71), not being applicable, is removed by the case of *The Hero* (1), which decides that s. 74 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), applies to Admiralty actions, and therefore it is sufficient if the defendant resides within the district of the county court, which is the case here, and if not, the property to which the cause relates, viz., the dock wall, was within the jurisdiction, and therefore the case would be within s. 21 of the former Act.

Again, assuming that there may be a doubt whether the collision with the dock wall was a collision within the meaning of s. 3 of the County Court Admiralty Jurisdiction Act, 1868, it is clear that it will be covered by the words "or otherwise" added in s. 4 of the amending Act of 1869, so that it is not material to enquire whether the subject-matter of the action

(1) [1891] P. 294.

falls within the jurisdiction of the Admiralty Division of the High Court, but it is submitted that the Admiralty Court Act, 1840, was intended, as the preamble states, to extend the jurisdiction of the Admiralty Court, and that in s. 6 the legislature has taken care to use distinct and apt words for the purpose, viz., "all claims and demands whatsoever in the nature of . . . . damage received by any ship . . . . whether such ship . . . . may have been within the body of a county, or upon the high seas."

[LOPES, L.J. Montague Smith, J., in *Everard* v. *Kendall* (1), gives the meaning of "damage by collision" in s. 3 of the County Court Act, 1868, as "damage sustained by a ship from another ship coming in contact with it." (2)]

Yes, but the point there was, as to the meaning of "ship," where a question arose as to the jurisdiction in respect of a collision between two barges. This does not meet the argument based on the words "or otherwise" in s. 4 of the amending Act of 1869. In the case of *The Douglas* (3), where the plaintiff's vessel struck on a sunken wreck in Gravesend Reach, the action was treated as a case of damage sustained by "collision," and the jurisdiction was not questioned. In *The Volant* (4), Dr. Lushington says (5): "The Court of Admiralty has jurisdiction over the whole subject-matter of damage on the high seas," and he proceeds to say that "the jurisdiction does not depend upon the existence of the ship, but upon the origin of the question to be decided, and the locality." As to the locality, the jurisdiction is extended to the body of a county by the Act of 1840, so that this case clearly is an Admiralty cause.

In the *Clara Killam* (6), where the anchor of a ship fouled a submarine telegraph cable, it was held that the Admiralty Court had jurisdiction.

[LORD ESHER, M.R. In *The Robert Pow* (7), where it was held that the Court of Admiralty had no jurisdiction to entertain a claim against a steam tug for damage caused by negligence in

(1) Law Rep. 5 C. P. 428.
(2) Law Rep. 5 C. P. 428, at p. 432.
(3) 7 P. D. 151.
(4) 1 Wm. Rob. 383.
(5) 1 Wm. Rob. 383, at p. 387.
(6) Law Rep. 3 A. & E. 161.
(7) Br. & L. 99.

C. A. 1892

TURNER v. MERSEY DOCKS AND HARBOUR BOARD. THE ZETA.

towing a vessel ashore, Dr. Lushington construes the word "damage" in s. 6 of the Admiralty Court Act, 1840, and s. 7 of the Admiralty Court Act, 1861, in its Admiralty sense as "damage done by collision."]

That decision does not affect the present case, as the plaintiffs' statement of claim sets out that the claim is for damages sustained by their steamship "by a collision with the wall of the pier-head."

Feb. 15. The argument was resumed by the defendants' counsel, and they were directed to confine themselves to the question of the jurisdiction of the Admiralty Court in the case of damage resulting from a ship striking a stationary object on the high seas.

In Godolphin's View of the Admiral Jurisdiction, the appendix (1) contains an extract of the ancient laws of Oleron, No. xv. of which deals with the case of an anchor left by the master and mariners of one ship doing damage to another ship, and it goes on to say that they are bound to give full satisfaction for the same."

By the statute 13 Rich. 2, c. 5, it was enacted that "the admirals and their deputies shall not meddle from henceforth of anything done within the realm, *but only of a thing done upon the sea.*" This restriction was removed by s. 6 of 3 & 4 Vict. c. 65.

[LORD ESHER, M.R. We have already gone through the history of the jurisdiction of the Court in our judgment in the case of *Reg.* v. *Judge of City of London Court.* (2) There is no doubt that the Admiralty Court claimed a very extensive jurisdiction, but it was compelled to yield to the prohibitions of the common law courts. The only question now for argument is as to the jurisdiction of the Court in cases of impact by a ship with a stationary body on the high seas.]

In *The Industrie* (3), it was held that the Court had jurisdiction where the plaintiffs' vessel sustained damage by taking the ground and striking against the town wall of Hartlepool, owing to the defendants' vessel blocking the fairway. Sir Robert Phillimore, saying (4) "It is now established that this Court has

(1) 2nd ed. (1685) p. 180.
(2) [1892] 1 Q. B. 273.
(3) Law Rep. 3 A. & E. 303.
(4) Law Rep. 3 A. & E. 303, at p. 307.

jurisdiction where damage has been done or received by a ship, although there may not have been any collision between two or more ships." In *Purkis* v. *Flower* (1), it was held that the Admiralty Court would have jurisdiction in respect of damage done to a ship by a barge on the high seas, the Court of Queen's Bench in this case following Dr. Lushington's decision in *The Sarah* (2), that the Admiralty Court had original jurisdiction in the case of collision with a keel propelled by a pole, as the matter complained of was a tort committed on the high seas.

In *The Uhla* (3) it was held that the Admiralty Court had jurisdiction in the case of a vessel doing damage by driving against the breakwater at Falmouth, and in *The Excelsior* (4), where similar damage was done, no question as to the jurisdiction was raised. In *The Albert Edward* (5) the Admiralty Court entertained a cause of damage to a mooring dolphin.

[LORD ESHER, M.R. If the plaintiffs are right in their contention, then the defendant dock company cannot set up contributory negligence as an absolute defence, and are thereby deprived of their common law right.]

No; it is submitted that the Admiralty rule on that point is limited to collisions between ships. It is contended on the other side that to give jurisdiction there must be a res; but this is not necessary, as the res may have been sunk, nor is it necessary that there might have been a res over which there would be a maritime lien; for it is clear that Admiralty jurisdiction may exist without a maritime lien, and a proceeding in rem does not depend thereon: *The Henrich Björn.* (6)

It is submitted that the recent case of *Reg.* v. *Judge of City of London Court* (7) does not govern the present, as there the attention of the Court was confined to the question whether the Admiralty Court had jurisdiction to entertain an action in personam against a pilot in respect of a collision caused by his negligence, between two ships on the high seas.

(1) Law Rep. 9 Q. B. 114.
(2) Lush. 549.
(3) Law Rep. 2 A. & E. 29, n.
(4) Law Rep. 2 A. & E. 268.
(5) 44 L. J. (Adm.) 49.
(6) 11 App. Cas. 270.
(7) [1892] 1 Q. B. 273.

C. A. 1892

TURNER v. MERSEY DOCKS AND HARBOUR BOARD. THE ZETA.

[The following cases were also referred to: *Flower* v. *Bradley* (1); *The Bilbao.* (2)]

Cur. adv. vult.

May 7. LORD ESHER, M.R. This case was tried before the President of the Probate, Divorce and Admiralty Division, and he gave judgment for the plaintiffs. After having given judgment for the plaintiffs, he gave them no costs whatever, on the ground that the case ought to have been brought in the county court. The case, according to the learned judge's description, was so difficult in point of fact that he for a long time was of a contrary opinion to that to which he finally came; and he only came to that opinion, he said, upon the facts, under the advice of the Trinity Masters. It seems, therefore, going a considerable length for him to deprive the plaintiffs of costs on the ground that they ought to have brought such an action as that, with those circumstances, in the county court. But we have no jurisdiction to interfere on that ground. The case was tried by the judge without a jury, and he had power over the costs if he had jurisdiction to deal with them, and the real question is whether he had any jurisdiction to deprive the plaintiffs of costs upon the ground on which he did deprive them. He deprived them on the ground, and solely on the ground, that the plaintiffs might have brought the action in the county court; and it is clear that the county court, in regard to the amount, in its common law jurisdiction, could not have entertained the case. He has, therefore, deprived the plaintiffs of costs on the ground that they might have brought this action on the Admiralty side of the county court.

Now, the action was an action by a shipowner for damage done to his ship in an inner basin of the Liverpool Docks, by reason of the servants of the Mersey Docks and Harbour Board having negligently given an order to the captain, which the captain was bound to obey, and which the captain did obey, without any unreasonable default of his own. Therefore, the learned judge found that the captain had not been guilty of any contributory negligence. He had obeyed an order which

(1) 44 L. J. (Ex.) 1.

(2) Lush. 149.

it was within the authority of the dock officials to give; but they had given that order negligently. The question then is, whether this was a case which the learned judge himself could have tried as an Admiralty action? Now, we have already held, in my opinion, certain rules of law which will govern this case. We have held that the statutes which have given jurisdiction to the county courts do not give to the county courts any jurisdiction which the Court of Admiralty itself cannot now exercise. That is the interpretation we have put on those statutes. We have further held, that the Acts which extend the jurisdiction of the Admiralty Court itself beyond what it formerly used to be have extended the jurisdiction of the Admiralty Court only in respect of matters, if they occur in inland waters, which could have been tried if they had happened on the high seas. The Admiralty Court, as everybody knows, in the older days had jurisdiction on certain matters—not on all matters—occurring on the high seas. It had no jurisdiction in respect of anything happening in what I call inland waters—that is, in rivers, or in parts of the seas which are within the boundaries of points of land. That therefore reduces this case in my opinion to this. Is this an action which could have been maintained by a Court of Admiralty at any time? Is it a cause of action which arises upon the high seas at all—which could possibly have arisen on the high seas? It is an action really against the defendants for having negligently exercised powers given to them in respect of their property within the borough of Liverpool and the county of Lancaster, and given to them in respect of their use of this property by Act of Parliament. Therefore the cause of action is a cause of action arising, and which can only arise, at the place where the property is fixed in respect of the use of this property; and the property is not only not on the seas—it is not in the river. It is an inside basin of the system of the Liverpool Docks, which basin is not upon any navigable waters at all. It is inside a basin which is situated on the land, in the county of Lancaster, and within the borough of Liverpool. The question is whether any such action could have been maintained in the Admiralty Court in old days. It is obvious that this action could not. But could any similar action, in such a

C. A. 1892

TURNER v. MERSEY DOCKS AND HARBOUR BOARD. THE ZETA.

Lord Esher, M.R.

state of things, arise on the open sea? There is no property that I have ever heard of in the open ocean. There is no property fixed there, absolutely fixed, always fixed, part of the land—because that is what it is in this action, part of the land—and which property is managed by the servants of the owner, or by the owner himself. I know that there are two cases in Marsden (1), which indefatigable industry has found. You have an action entertained by the owner of one ship against the owner of another ship on the ground that the plaintiff's ship was injured by an anchor belonging to the other ship left fixed for a time at the bottom of the river. Both the cases I refer to occurred in the river. It may be that they occurred within such part of the river as was within Admiralty jurisdiction—within the hovering part of the river, as it is called. Some time ago I made certain observations upon those cases in Marsden (2), that they are not authorities for any decision; they are mere notes as taken by the registrar of the Court, but still they may be cited to shew that such an action was maintained. Now, were these actions anything like this case? I have not the least doubt, if those actions were maintained, that the ground was this—that the action was by the one ship against the other ship for improperly managing her tackle, that is to say, her anchor; and I have no doubt that what happened was this, that the defendant's ship had come to anchor in this place, had dropped her anchor, and for some reason or other had let go her moorings, and was herself away at the moment of the accident. She left her anchor with a small buoy, or some means by which when she came back again she would get her anchor again. Everybody who has ever been on board a ship knows that that may happen. If you go into Cowes Roads you find it happening every morning and every afternoon, and, therefore, if the case, as I say, were entertained, and went to judgment, it was against the defendant's ship, for negligently leaving her anchor as part of her tackle, for a time, until she came back to take it

(1) Burrell's Admiralty Cases, 1648–1840, edited by Marsden, p. 243, *Clarke* v. *Scattergood, The Warewell and the Susan*; and p. 284, *Tills* v. *The Mary, Munday* v. *The Mary.*

(2) See *Reg.* v. *Judge of City of London Court*, [1892] 1 Q. B. 273, at p. 298.

up again, without a sufficient warning, on the bed of the river. Whether one would think that that was a cause of action now I know not—whether it really proceeded to judgment I know not; but if it was, it must have been on those grounds—not that the anchor was a fixed object, that it became part of the land, but that it had not. Then I know that there is a case of an injury done to the breakwater at Plymouth. Now, I have already dealt with several of these cases. For a time after the passing of some of these Acts the decisions in the Court of Admiralty vacillated. Dr. Lushington for a time was inclined to give the full literal meaning to the Acts of Parliament, and say that any thing done at sea, or anything done anywhere by a ship, was to be considered as within the Admiralty jurisdiction; but, in my opinion, he himself changed his views upon this; and if he did not, this Court has overruled his views. I know that Sir Robert Phillimore was more imbued than any man that has lived in my time with the idea that the Admiralty Court had all the jurisdiction which it ever had. He was of opinion that that Court had jurisdiction over every tort committed on the high seas, and his opinion has gone in some cases to what I call extreme lengths; but as I understand our judgments, there have now been several, and in one case the argument lasted several days: *Reg.* v. *Judge of the City of London Court* (1), and every case upon the subject that industry could find and ingenuity could torture was brought before us. But our judgment was this: that the County Courts Acts have given no further power to the county court than the Admiralty Court had, and I think it is equally distinctly decided that the Admiralty Court Acts themselves only give to the Admiralty Court power within inland waters which the Admiralty Court had had upon the high seas. Then to say that there ever was known in all the long course of Admiralty jurisdiction, in all the long disputes between Admiralty and Common Law, a case of some building, some rock, or some piece of land on the high seas with somebody on it to whom it belonged, who did something negligent with reference to its management, and thereby injured a ship—to say that any such action ever was heard of in the Admiralty Court, to my mind,

(1) [1892] 1 Q. B. 273.

C. A. 1892

TURNER v. MERSEY DOCKS AND HARBOUR BOARD. THE ZETA.

Lord Esher, M.R.

seems impossible. And, as for this case, just imagine anybody supposing that in the times when there were these disputes between the Admiralty and the Common Law, and this action had been brought in respect of this damage in the county of Lancaster, in the borough of Liverpool, whether there would not have been a prohibition of the most stringent kind immediately following it?

The importance of the matter is this, that if this case were tried at Common Law the rules of law are clear that if there were mutual negligence it would be a defence to the action. Whereas, if you tried this case in Admiralty, in my opinion the Admiralty would in this, as in every case of damage which they ever entertained, exercise their own rule, that if there was contributory negligence you must add the damages together and divide them. So that if the dock had been injured, and the ship had been injured, and there had been mutual negligence, the damages would have to have been divided.

Now we come shortly to this. In my opinion the President had no jurisdiction whatever to try this case as an Admiralty case. He had jurisdiction to try it as a Common Law case, because he is a judge of the High Court—rather, I should say, he had jurisdiction, therefore, to try this case at Common Law. Whether he intended, if he had found mutual negligence, to apply the Common Law rule or the Admiralty rule I cannot say. If he had attempted to apply the Admiralty rule I should have thought that it was erroneous. He had Common Law jurisdiction to try this case. He had no Admiralty jurisdistion to try it; and, therefore, although he had the power, the ground upon which he deprived the plaintiffs of their costs was a wrong one, for he had no jurisdiction to say that this was an Admiralty case. I therefore cannot agree with him—great and admirable judge that he is in these cases—and I think that the appeal ought to be allowed.

FRY, L.J. The question we have to determine in this appeal depends upon the construction to be given to the County Courts Admiralty Jurisdiction Acts, 1868, 1869. The first of these Acts provides, by s. 3, that any county court having Admiralty

jurisdiction shall have jurisdiction to try, amongst other causes, any claim for damage by collision when the amount claimed does not exceed 300*l.* The amount claimed in this case did not exceed 300*l.*; therefore, the only question is, whether this is a claim for damage by collision within the meaning of this section. This section was enlarged by the subsequent Act of 1869, and it was provided that the section should extend and apply to all claims for damage to ships, whether by "collision or otherwise," when the amount claimed did not exceed 300*l.* It is to be observed, in the first place, that the earlier statute gave jurisdiction in the cases named. It does not give Admiralty jurisdiction in the cases named; but in the most explicit terms it gives jurisdiction.

Now, it appears to me that, reading those clauses, it is impossible to say that the claim in the present case—a claim by the owner of a ship for injury done to his ship by collision with the wall of a dock—is not a claim for damage to a ship by "collision or otherwise"; and, therefore, primâ facie, one would suppose within the jurisdiction of the county court under those statutes, or one of them. But, then, it is said that we are bound by the previous decisions of this Court, to hold that the jurisdiction so given by these Acts is confined to Admiralty jurisdiction. It is said that the recent case of *Reg.* v. *Judge of the City of London Court* (1) gives colour to that argument.

I therefore feel myself driven to inquire whether, in the years 1868–69, Admiralty jurisdiction existed which would cover a case of a claim of this sort. The Admiralty jurisdiction which existed in the year 1868 was of a double character. There was the original jurisdiction which existed in the ancient Court of Admiralty, the jurisdiction of the Lord High Admiral, and there was the enlarged jurisdiction given by the statute 3 & 4 Vict. and by the statute 24 Vict. Those statutes professed to enlarge and did enlarge the jurisdiction of the Admiralty Court. The first provided, amongst other things, that the Court of Admiralty should have jurisdiction to decide all claims and demands whatsoever in the nature of damage received by any ship, whether such ship may have been within the body of a county

(1) [1892] 1 Q. B. 273.

C. A. 1892

TURNER v. MERSEY DOCKS AND HARBOUR BOARD. THE ZETA.

Fry, L.J.

or upon the high seas at the time the damage was received, and the Act of 24 Vict. gives jurisdiction over any claim for damage done by any ship. The one case provides for damage received by the ship, the other case provides for damage done by the ship. Those statutes, for the first time, gave Admiralty jurisdiction within the body of a county. Well, this does appear to me to be a case of damage received by a ship; but then it is said that these statutes were only intended to give, within the body of a county, the same jurisdiction as existed before on the high seas. Now, yielding to this argument for the purpose of the present inquiry, it follows that I am bound to inquire whether the High Court of Admiralty would have had, before 3 & 4 Vict., jurisdiction in respect of damage done on the high seas to a ship by a fixed object on the high seas. It will be said that such objects are rare, and that cases of collision would never have been the subject of litigation. It requires no very great stretch of imagination to imagine rafts of timber, or some such structure, getting permanently attached to a coral reef, or rocks, or a sand bank, and to imagine a collision between that object upon the high seas and some vessel. Supposing such an occurrence had happened, would it have been within the jurisdiction of the Lord High Admiral? In the first place, it is to be observed that no case of prohibition of jurisdiction in any such case can be found in the books. On the other hand, it is to be observed that the undoubted jurisdiction of the Lord High Admiral was over everything happening upon the high seas. It has been described as a general power, taking cognizance of all maritime cases. That would in itself go a considerable way towards shewing that the Court must have had jurisdiction in these cases; but in my judgment other considerations lead to the same conclusion. It has been doubted whether the jurisdiction of the Admiralty Court or of the Lord High Admiral arose in the reigns of Edward III. or Richard I. or Henry I.; but, whenever it arose, it arose at a time when the distinction did not exist between local and transitory actions, and the Courts of this country had no jurisdiction to entertain actions which did not arise within a county. In what Court, then, could such an action as that I have mentioned have been tried? The answer appears

to me to be that it would be tried in the Court of the Lord High Admiral, or in no Court at all.

That consideration leads me to say that there are two authorities to which the Master of the Rolls referred. One case, in 1663, which is to be found in Mr. Marsden's Admiralty Cases (1), and which is not a note of a judgment given by the Registrar, but is an actual decree of the delegates, and is given in full by Mr. Marsden. Now, in that case the delegates condemned the *Susan* in the amount of the loss of the *Warewell* and her cargo, caused by a collision between the *Warewell* and the unbuoyed anchor of the *Susan* in the Thames. A somewhat similar case, but of which the report is less full, occurred in the year 1703—it is also reported by Mr. Marsden—the case of *Munday* v. *The Mary* (2), where a similar decree of the Admiralty Court was made. The action was in the Thames, within the ebb and flow of the tide, and within the jurisdiction of the Court. Without saying those cases are decisive of the point, they are distinctly in the direction to which I have arrived. They do not purport in any way to find that the anchor was part of the tackle of the ship.

It appears to me, therefore, that the Court of the Lord High Admiral must have had jurisdiction if such a case had occurred on the high seas. To say that he had not jurisdiction in a case occurring in the county of Lancaster is perfectly true; but that does not decide the question. Since those statutes to which I have referred were passed, there is a decision of Dr. Lushington upon the 3 & 4 Vict. in *The Sarah* (3)—a case of damage received by a ship. The schooner *Gleaner* sued the steam-tug *Secret* and the keel *Sarah*. The *Sarah* was not a sea-going vessel—she was not a ship within the meaning of the term; she was a river boat propelled by a pole or oar. The *Gleaner* sued the *Secret* for damages received by a collision with the *Sarah* whilst towed by the *Secret* upon the high seas, and the learned judge maintained to the fullest extent the jurisdiction

(1) Burrell's Admiralty Cases, edited by Marsden, p. 243, *Clarke* v. *Scattergood, The Warewell and The Susan.*

(2) Burrell's Admiralty Cases, edited by Marsden, p. 284, *Tills* v. *The Mary, Munday* v. *The Mary.*

(3) Lush. 549.

C. A. 1892

TURNER v. MERSEY DOCKS AND HARBOUR BOARD. THE ZETA.

FRY, L.J.

of the Court over such a case, basing it upon the original jurisdiction of the High Court of Admiralty.

Now, take the other case, the case arising on the 24 Vict., of damage done by any vessel. In respect of that matter, there are no less than four or five decisions which go to shew that damage done by a ship to a fixed body is within the jurisdiction of the Court—damage done by a ship to a barge. That was the case of *The Malvina* (1) before Dr. Lushington; and there are two cases of damage by a ship to a breakwater before Sir Robert Phillimore, *The Uhla* (2) and *The Excelsior* (3). There is also the case of a telegraph cable, *The Clara Killam* (4), before Sir Robert Phillimore. Therefore it appears to me that we have legislation which seems to have been intended to give reciprocal rights in cases of damage done by a ship and to a ship, and that in both those cases it has been determined that it is not necessary that the body receiving or doing the damage shall be a ship.

I think, therefore, that the decisions upon those statutes strongly confirm the conclusion to which I have arrived. But then it is said there is a difficulty caused by the rule of the Admiralty Court with regard to the cases of common negligence. That rule has never been applied, so far as I am aware, to any case except to a collision between ships. Furthermore, it is to be observed that the legislature, in stating the rule in the Judicature Act (5), has stated that the rule applies to collisions between two ships, and therefore to state that it should be applied to a case of this sort seems to me to be a gratuitous assumption.

In the view the Master of the Rolls takes, this case has already been covered by previous decisions in this Court. If it appeared to me to be so, I should at once agree; but I am not able to find that the point which has been raised on the present occasion has ever received the decision of this Court; and, according to my view, the learned President of the Court below did right to say that under the statutes he had jurisdiction. If the matter rested with me, I should give my voice in favour of the decision of the learned judge; but I have the misfortune, I believe, to differ,

(1) Lush. 493.
(2) Law Rep. 2 A. & E. 29, n.
(3) Law Rep. 2 A. & E. 268.
(4) Law Rep. 3 A. & E. 161.
(5) 36 & 37 Vict. c. 66, s. 25, sub-s. (9).

not only from the Master of the Rolls, but also from my learned brother.

LOPES, L.J. In this case I feel compelled to take the same view as that expressed by the Master of the Rolls. It appears to me most material in the first place to consider what was the decision in the case of *Reg.* v. *Judge of the City of London Court* (1), and, putting it shortly, what I understand to be decided in that case is this: that no greater jurisdiction than that which is possessed by the Admiralty Court is conferred upon the county court, except with regard to charterparties. Except with regard to charterparties, the jurisdiction conferred on the county court is a jurisdiction of the Admiralty Court limited to 300*l*. It is no larger jurisdiction than the Court of Admiralty would have had if what happened had happened on the high seas.

That being so, that disposes of the County Court Acts, and we therefore look to the jurisdiction of the Admiralty Court independently of the county court. If what happened in this case had happened on the high seas, the question then is, Could this action have been maintained in the Admiralty Court? What kind of action would it have been? It would have been an action in personam for damage done to a ship on the high seas arising from the negligence of somebody who managed a fixed object on the high seas. To my mind, such a case is almost inconceivable. My brother Fry has referred to the case of rafts and other matters; but it seems to me highly incredible that they would happen. I am of the same opinion, therefore, as the Master of the Rolls—that the Lord High Admiral had no jurisdiction in a case of this kind. It has been said that there is no case of prohibition. Well, I think the answer to that is obvious, because no attempt, as far as I know, has ever been made to exercise any jurisdiction of this kind, and, therefore, it is easy to understand why no case of prohibition can be found. Then, again, if the case had been tried at common law, contributory negligence would have been an answer; it would have been a good plea in bar. If a case like this had been tried in the

(1) [1892] 1 Q. B. 273.

C. A. 1892

TURNER v. MERSEY DOCKS AND HARBOUR BOARD. THE ZETA.

Admiralty Court, there would have been a division of damages. The whole procedure would have been entirely different. I am, therefore, unable to agree with the learned President, and think that this appeal ought to be allowed.

Appeal allowed; leave to appeal to House of Lords.

Solicitors for the plaintiffs, the owners of the *Zeta*: *Botterell & Roche.*

Solicitors for the defendants, the Mersey Docks and Harbour Board: *Rowcliffes, Rawle & Co., agents for A. T. Squarey, Liverpool.*

T. L. M.

1892

April 12; *May* 10.

THE DICTATOR.

Admiralty—Salvage—Action in rem—Appearance of Owners of res—Award in excess of undertaking to put in Bail—Personal Liability of Owners of res.

In an action in rem for salvage services, the writ was directed in the usual form "to the owners and parties interested" in the res, and indorsed with a claim for 5000*l.*

As the owners of the salved ship, her cargo, and freight appeared as defendants, and through their solicitor gave an undertaking to put in bail for the above amount, the plaintiffs did not arrest the vessel, or interfere with the discharge of the cargo.

The value of the salved ship, her cargo, and freight was 179,200*l.*, and at the hearing the Court made an award of 7500*l.*

The plaintiffs subsequently obtained leave to amend the indorsement on the writ by altering the sum named therein to 8500*l.* (*The Dictator*, [1892] P. 64).

The amount of the award was affirmed on appeal, and the defendants paid the costs, but denied their liability in respect of the amount awarded beyond the amount of the undertaking to put in bail, viz., 5000*l.*

The plaintiffs thereupon moved for leave to proceed personally for the full amount awarded:—

Held, that the remedy was not limited by the amount of the undertaking to put in bail, and that the plaintiffs were entitled, in the present action, to sue out writs of fieri facias, in order to enforce payment, from the defendants personally, of the full amount of the decree.

SUMMONS by plaintiffs, in an action in rem for salvage, for particulars of the names and addresses of the defendants, the owners of the steamship *Dictator*, her cargo, and freight, with a

1892

THE DICTATOR.

view to proceeding personally against them for the recovery of a salvage award.

The facts—so far as material—were shortly that, on November 12, 1891, the Gamecock Steam Towing Company and others issued a writ in rem, directed to the owners and parties interested in the steamship *Dictator*, her cargo, and freight, indorsed with a claim for 5000*l.* for salvage services.

On November 13, the solicitors acting for the owners of the *Dictator*, and on behalf of ship, freight, and cargo, gave the following written undertaking: "We undertake to appear for the defendants in due course, and to prove values in the usual manner, and put in bail whenever required in an amount not exceeding five thousand pounds."

In consequence of this undertaking the ship was not arrested, nor was the discharge of the cargo interfered with. The value of the salved ship, her cargo, and freight was 179,200*l.*

On November 26 the action was tried before the President (Sir Charles Butt), with two of the Elder Brethren of the Trinity House as assessors, and resulted in a salvage award of 7500*l.*, being 2500*l.* in excess of the sum indorsed on the writ.

On December 15 the President gave leave to amend the indorsement on the writ by increasing the amount claimed from 5000*l.* to 8500*l.* (1)

On March 10, 1892, the defendants appealed on the ground that the amount was excessive; but the Court of Appeal affirmed the award.

The defendants paid the costs, and offered to pay the 5000*l.* for which they had undertaken to put in bail; but the plaintiffs declined to accept this sum, and, on April 5, with a view to enforce payment of the whole award, took out a summons, returnable before the Admiralty registrar, for particulars of "the names and addresses of the defendants, the owners of the steamship *Dictator*, her freight, and the cargo, and as to the defendant cargo owners, setting opposite their respective names, addresses, and description, the value of the cargo on board the *Dictator* at the time the salvage services were rendered respectively belonging to them."

(1) *The Dictator*, [1892] P. 64.

1892

THE DICTATOR.

The registrar declined to make any order on the summons, and referred it to the judge, by whom it was adjourned into court, and, at the hearing, it was, by consent, treated as an application to try the question whether execution could be issued against the owners of the salved ship, her cargo, and freight, for more than 5000*l.* and costs.

Barnes, Q.C., in support of the plaintiffs' application. The decree of the president "pronounced the sum of 7500*l.* to be due to the plaintiffs for the salvage services by them rendered to the steamship *Dictator*, and the cargo, together with costs, and he condemned the defendants in the said sum of 7500*l.* and costs." The plaintiffs have, therefore, a judgment in their favour for this amount; and as the defendants appeared and gave an undertaking equivalent to bail, they have submitted themselves to the jurisdiction of the Court, and have thereby rendered themselves personally liable in the action to the extent of the value of the property, which largely exceeds the amount now sought to be recovered. The result is, that the plaintiffs are in a position to issue execution against the property of the defendants to the extent of the property proceeded against, and under the present practice it is not necessary that a monition to pay should be served on the defendants before suing out writs of fieri facias; but the judgment of this Court for a specific sum, affirmed by the Court of Appeal, can be enforced at once by the plaintiffs under Order XLII., r. 3, 17 (1), for under ss. 15 and 22 of the Admiralty Court Act, 1861 (2), decrees and orders of the Court

(1) Rules of the Supreme Court, 1883, Order XLII., r. 3: "A judgment for the recovery by or payment to any person of money may be enforced by any of the modes by which a judgment or decree for the payment of money of any Court whose jurisdiction is transferred by the principal Act might have been enforced at the time of the passing thereof."

Rule 17: "Every person to whom any sum of money or any costs shall be payable under a judgment or order shall, so soon as the money or costs shall be payable, be entitled to sue out one or more writ or writs of fieri facias . . . ."

(2) 24 Vict. c. 10, s. 15: "All decrees and orders of the High Court of Admiralty, whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the same effect as judgments in the Superior Courts of Common Law, and the persons to whom any such moneys or costs, charges or expenses, shall be payable, shall be deemed judgment creditors, and all powers of

1892

THE DICTATOR.

of Admiralty are to have the effect of judgments at common law, and the judge is to have power to issue any new writ or process necessary or expedient to give effect to the Act. Although these sections are repealed by 44 & 45 Vict. c. 59, the rights thereby created are, by the same statute, preserved.

Sir Walter Phillimore, for the defendants. A writ of summons in an Admiralty action in rem is issued with a view to obtaining judgment against a res, and though, under the Judicature Acts, there is little apparent difference in the writ in rem or in personam, alterations in procedure do not alter rights. According to the form of a writ in rem now in use (Rules of Supreme Court, 1883, Appendix A, Part I., No. 11), the writ is directed "to the owners and parties interested" in the res, not to specified defendants. If the owners and parties interested do not appear, the res is arrested by the marshal and sold, but there is no judgment against the owners of the res. In this case there was no arrest and sale because the defendants appeared and undertook to put in bail to an amount which now represents the res, and beyond which they cannot be made liable. The defendants have offered to pay the amount covered by the undertaking to put in bail, with costs; but if they had not, and if bail had been given, then the proper proceeding would have been to serve on the bail a monition to pay, and, on default, writs of execution might be taken out against them.

The costs may be recovered personally against the defendants, because they appeared, and where a fi. fa. could not be issued, owing to the defendants being foreigners, the ship was re-arrested

---

enforcing judgments possessed by the Superior Courts of Common Law, or any judge thereof, with respect to matters depending in the same Courts, as well against the ships and goods arrested as against the person of the judgment debtor, shall be possessed by the said Court of Admiralty with respect to matters therein depending; and all remedies at common law possessed by judgment creditors shall be in like manner possessed by persons to whom any moneys, costs, charges, or expenses are by such orders or decrees of the said Court of Admiralty directed to be paid."

Sect. 22: "Any new writ or other process necessary or expedient for giving effect to any of the provisions of this Act may be issued from the High Court of Admiralty in such form as the judge of the said Court shall from time to time direct."

1892

THE DICTATOR.

for the costs: *The Freedom.* (1) In the present case the costs have been paid, so that no fi. fa. can issue for them. The plaintiffs can only now rely upon the defendants' undertaking to put in bail whenever required in an amount not exceeding 5000*l.* This undertaking the defendants have offered to carry out; so that the case stands in the same position as if bail had been given. The bail now represents the ship, and is a substitution of personal security for that of the res, so that it cannot be re-arrested for the same cause of action: *The Kalamazoo.* (2) That bail is equivalent to the res is emphatically laid down by Baggallay and Fry, L.JJ., in *The Christiansborg.* (3) That bail is a substitute for the property also appears from the bottomry case of *The Staffordshire.* (4) In order to obtain any excess, the plaintiffs may bring an action in personam: *The Orient* (5); but the Court cannot engraft upon a proceeding in rem proceedings in personam to make good the excess: *The Hope.* (6) The defendants, by appearing to protect their interest in the res, only appear as owners, and though it is true that the appearance may enlarge the writ to the extent of costs, it will not do more, there being no personal liability beyond the value of the res: *The Volant.* (7) Personal liability is no more incurred by owners who appear in an action in rem than by a mortgagee who has a right to intervene to protect his interest, but his appearance will not involve him in personal liability.

Barnes, Q.C., in reply. An action in personam will lie for salvage: *Five Steel Barges* (8), and, to recover the excess over the amount of bail given in this case, the defendants admit, by citing *The Orient* (5), that a proceeding in personam would be available. It is submitted that no object would be gained by incurring the additional costs of fresh proceedings, when relief may be given in the present action. Again, a maritime lien arises for the full amount of the claim: *The Bold Buccleugh* (9), and the mistake made, in the first instance, in the amount for

(1) Law Rep. 3 A. & E. 495.
(2) 15 Jur. 885.
(3) 10 P. D. 141.
(4) Law Rep. 4 P. C. 194.
(5) Law Rep. 3 P. C. 696.
(6) 1 Wm. Rob. 154.
(7) 1 Wm. Rob. 383.
(8) 15 P. D. 142.
(9) 7 Moo. P. C. C. 267.

1892

THE DICTATOR.

which the writ was issued, having been amended, the lien would exist for the whole amount awarded, which is now covered by the amount indorsed on the writ. In *The Flora* (1) it was held that the Court can, where insufficient bail has been taken, allow the vessel to be re-arrested, and order further security to be given. In *The Freedom* (2) the vessel proceeded against was re-arrested for the balance of costs. The case of *The Kalamazoo* (3) is regarded as overruled by *The Johannes* (4), where leave was given to amend the præcipe by increasing the amount for which the suit was instituted; and in *The Hero* (5) further bail was, before judgment, obtained on payment of costs. No doubt in *The Wild Ranger* (6) it was held that proceeds arising out of the sale of the vessel, in another action, were as free from lien as the released vessel herself; but in *The Miriam* (7), the plaintiffs appealing to this Court were held entitled to have the vessel re-arrested after being released in the county court in consequence of the suit in rem being dismissed. *The Hope* (8) and *The Volant* (9), in which the Court held that proceedings in personam cannot be grafted on an action in rem, were decided before the Admiralty Court Act, 1861. It is submitted that there is no inherent difficulty in the way of the plaintiffs, the whole question being one of procedure, and the plaintiffs rely upon *The Zephyr* (10), where an order was obtained, after judgment, against the defendant personally to satisfy the deficiency where the amount in which bail had been given was not equal to the damages.

Cur. adv. vult.

May 10. JEUNE, J. (after stating the nature of the application before him, proceeded):—It is agreed that the real object of the resistance to this application is to try the question whether execution can be issued against the owners of the ship and cargo for more than 5000*l.* and costs.

If this had been an action in personam, as it might have been

(1) Law Rep. 1 A. & E. 45.
(2) Law Rep. 3 A. & E. 495.
(3) 15 Jur. 885.
(4) Law Rep. 3 A. & E. 127.
(5) Br. & L. 447.
(6) Br. & L. 84.
(7) 2 Asp. M. L. C. (N.S.) 259.
(8) 1 Wm. Rob. 154.
(9) 1 Wm. Rob. 383.
(10) 11 L. T. (N.S.) 351.

1892

THE DICTATOR.

Jeune, J.

(*Five Steel Barges* (1)), no doubt execution could be levied for the full amount of the award, it being within the value of the property salved. But it is an action in rem, and the contention is that in such an action, even when the owners of the res appear, there cannot be execution for any greater amount than that originally claimed, or, at least, than the amount for which bail has been given and costs.

The question, therefore, is what, when the owners of the res have appeared in a salvage action in rem, is the limitation (other than the value of the property salved) on the powers of the Court to award salvage, or the power of the plaintiff to enforce its payment if awarded.

It is necessary to consider whether, in an action in rem, when a personal action would lie against the owners, judgment can be enforced for more than the value of the res; because, if it can, no doubt it can be enforced for more than the amount of the bail. In a salvage action in rem the question so stated has probably seldom arisen (the case of *The Jonge Bastiaan* (2) is, however, an instance of it), because the property salved is generally identical with the res, and the salvage award never goes beyond the value of the property salved. But in actions of damage the question may readily arise now that the limit of liability may exceed the value of the ship by which the damage was caused, and probably it arose not infrequently before the limit of value of the ship was imposed by statute as the limit of the amount to be recovered. It is one upon which the highest authorities are in conflict, and I think it can be solved only by considering the practice, especially the early practice, of the Admiralty Court, and the different views which at different times have been taken of the effect of an action in rem.

There can, I think, be no doubt that the Courts of Common Law always clearly drew the distinction between the case of the Court of Admiralty having jurisdiction by reason of hypothecation, or lien, or other reason over a res, and that Court seeking to exercise jurisdiction against individuals personally, with regard to whom no such jurisdiction in the view of the Courts of Common Law existed, and, while they allowed the

(1) 15 P. D. 142. (2) 5 C. Rob. 322.

action to proceed in regard to the former matter, prohibited it as to the latter: *Johnson* v. *Shippen* (1) approved by Blackburn, J., in *Castrique* v. *Imrie* (2); and probably the Court of Admiralty, in cases such as *The Ruby Queen* (3), recognised that that Court might have jurisdiction quoad the res, though not quoad its owners. But the Admiralty Court, it would appear, did not in early times treat the action in rem as a specific and distinct form of action. If we turn to the Praxis Curiæ Admiralitatis of Clerke (whom Lord Hardwicke (4) described as "an author of undoubted credit"), and select an edition published in the middle of the last century—I take that of Simpson, published in 1743—we find a complete sketch of the procedure in causes in the Court of Admiralty in force at that time, and probably for a long period before. In all actions in that Court, the respondent, if he appeared (Tit. 12), had to find bail for the amount in which the action was instituted, or go to prison, and then the action proceeded against him in personam; and if judgment went against him he was monished to pay the amount ordered (Tit. 63), or if he failed to do so, his bail (Tit. 64, 65), the consequence of default being attachment (Tit. 67, 68). If he did not appear (Tit. 28), his appearance could be enforced by seizure of any ship or any goods belonging, or supposed to belong, to him within the Admiralty jurisdiction, the real owner being able to intervene and claim them. If after such seizure he appeared and gave bail (Tit. 37), the ship or goods were delivered over to him, and the case proceeded "*ut in actione institutâ contra personam debitoris.*" It would seem clear that the arrest in such cases was not limited to any particular property of the defendant on the seas, that the object of the arrest was to secure appearance and bail, or provide a fund for securing compliance with the judgment; and that whatever was the value of the property, or the amount of the bail, the defendant would be liable to pay, and liable to be attached if he did not pay, the full amount of the sum decreed against him. No doubt the main object of arrest, whether of person or property, was to secure that bail should be given to satisfy the judgment. In Ridley's

(1) 2 Ld. Raym. 982.
(2) Law Rep. 4 H. L. 414, at p. 431.
(3) Lush. 266.
(4) 1 Atk. 296.

1892

THE DICTATOR.

Jeune, J.

'View of the Civile and Ecclesiasticall Law,' published in 1639, the author writes: (1) "The proceeding in all these civile matters is by libell concluding to the action, the party agent giving caution to prosecute the sute, and to pay what shall be judged against him, if he faile in the sute; the defendant, on the contrary part, securing his adversarie by sufficient suertie, or other caution, as shall seeme meet for the present to the Judge, that he will appeare in judgment, and will pay that which shall be adjudged against him, and that hee will ratifie and allow all that his Proctor shall doe in his name; for to all these ends satisdation" (that is, security) "in judgement is, which is nothing else but a course to secure the adversary of that which is in debate before the judge, that on what side soever the cause shall have an end, the clients may be sure to get that which by law shall be adjudged unto them." A similar view of the action in the Admiralty Court is to be gathered from Godolphin, writing towards the end of the 17th century. In enumerating the modes of procedure, he speaks (2) of arrest of property only as a means to compel appearance. Similarly, the table of fees at the end of Spelman's Treatise (3), left by him at his death in 1641, contains the item, "Pro relaxatione navis aut bonorum ab arresto," which I think refers not merely to ship and cargo, but to any property of the defendant; and that the action in rem was not then regarded by Admiralty practitioners as a peculiarity existing in Admiralty procedure seems to me clear from the fact that Prynne, in 1669, in his answer to Lord Coke's Articuli Admiralitatis, while enumerating the advantages which that procedure possessed over the Common Law, makes no mention of any such special form of action.

It would appear, therefore, that, under the earlier practice, the distinction between actions in personam and actions in rem depended on whether the person or the property of the defendant was arrested in the first instance, and, if the defendant appeared, the procedure and effect of the action in rem became those of an action in personam. But several changes in law or practice

(1) 3rd ed. p. 94.

(2) Godolphin's Admiral Jurisdiction, London, 1685, p. 41.

(3) Discourse of the Admiral Jurisdiction and the Officers thereof.

took place. Actions beginning with arrest of the person became obsolete in practice, as Dr. Lushington says in *The Clara* (1), in the last century, the last recorded instance being in 1780; and arrest of property merely to enforce appearance became rare or obsolete, though in theory such arrest of the person or property would seem still to be permissible (per Fry, L.J., in *The Henrich Björn.* (2)) On the other hand, arrest of property over which a lien could be enforced became more common as the idea of a pre-existing maritime lien developed, and arrest of property, in order to assert, for the creditor, that legal nexus over the proprietary interest of his debtor, as from the date of the attachment, of which Lord Watson speaks in *The Henrich Björn* (3), grew up. The result was that arrest became the distinctive feature of the action in rem, such arrest having primarily for its object the satisfaction of the creditor out of the property seized. But there seems no reason to suppose that the action beginning by arrest of the res altered the course or character it had hitherto assumed as to the appearance of the debtor in it; and, if that be so, it would seem clear that the full amount of a judgment, if a defendant, who might himself have been arrested, appeared, could be enforced by the means available in the Admiralty Court, monition and attachment, whatever the value of the property arrested was.

Nor, when we come to a later period, can it, I think, be doubted that the view of a defendant's liability, which I have endeavoured to express, was the view of Lord Stowell. In *The Dundee* (4), decided in 1823, Lord Stowell said (5): "The quantum of reparation due in such cases (that is, of damage) has been differently measured in the maritime laws of different commercial countries, and of the same commercial country, amongst others our own, at different periods. The ancient general law exacted a full compensation out of all the property of the owners of the guilty ship upon the common principle applying to persons undertaking the conveyance of goods, that they were answerable for the conduct of the persons whom they employed, and of

(1) Sw. 1, at p. 3.
(2) 10 P. D. 44, at pp. 53, 54.
(3) 11 App. Cas. 270, at p. 277.
(4) 1 Hagg. Adm. 109.
(5) At p. 120.

1892

THE DICTATOR.

Jeune, J.

whom the other parties who suffered damage knew nothing, and over whom they had no control. To this rule our own country conformed." And at p. 124: "It is an admitted fact, that this mode of initiating a suit by arrest of *ship*, *tackle*, *apparel*, and *furniture*, is the ancient formula of the Court, though leading to a full remedy affecting all the property of every kind belonging to the owners. The same formula has existed and operated its remedy under all the variations by which the remedy has been modified. It has been no further restricted than as the statutes restrict it. But the initiatory terms, *tackle*, *apparel*, and *furniture*, founded the suit sufficiently to embrace all the objects which the statutes left subject to its operation. These restrained them only by their own particular restrictions. The same words went as far as the general law went, notwithstanding the narrowness of those terms; and they must now go as far as the general law, limited only by that statute, extends." There can, I think, be no doubt from these words what was the view of Lord Stowell. In the case of *The Khedive* (1), Lord Blackburn, after quoting them, says (2): "Lord Stowell treats it as quite clear that, though the mode in which the Court of Admiralty founded its jurisdiction was by a seizure of a ship, the recompense in damages decreed by that Court could be enforced against the owners out of all their property of every kind; so that the result was that, by the general law, the owners might be made to pay to the utmost farthing the recompense in damages decreed by the Court of Admiralty, however small the value of their ship when seized was. Parke, B., in *Brown* v. *Wilkinson* (3), says: 'From the practice of the Court of Admiralty no light could be derived on this question, for that Court proceeds in rem, and can only obtain jurisdiction by seizure, and the value, when seized, is the measure of liability.' It is not, I think, necessary to decide between those very high authorities. If it were, I should wish to make further search amongst the cases on prohibition; but primâ facie, one would say, Lord Stowell was more familiar with the subject, and therefore more likely to be accurate." It is, unfortunately, now necessary to decide between the high authorities to whom Lord

(1) 7 App. Cas. 795. (2) At p. 813.

(3) 15 M. & W. 391, at p. 398.

1892

THE DICTATOR.

Jeune, J.

Blackburn refers. I am not quite sure that prohibition affords a complete test, because, given the liability of the owners to make full compensation to be enforceable by the Court of Admiralty, the rest seems to be a question of procedure, and not one of jurisdiction. But if prohibition be the test in this case, it certainly supports Lord Stowell's view. Although, as I have said, prohibition was granted as to the owners when the Court of Admiralty proceeded against them, having jurisdiction to proceed only against the res, I cannot discover any prohibition to the Admiralty Court either for proceeding against the res, and owners, where there was a jurisdiction against the owner personally, or for issuing attachment against the owners to enforce payment of an amount exceeding the value of the res, and certainly no trace of any such appear in the Articuli Admiralitatis, or in the replies to Lord Coke, where one would have expected to find it. I would further remark that, though the case of *The Dundee* (1) was referred to in *Brown* v. *Wilkinson* (2), attention does not appear to have been drawn in argument to the Admiralty practice, and that the dicta of Baron Parke are mistaken in asserting that the Court of Admiralty can obtain jurisdiction only by seizure, and appear altogether to ignore the Admiralty jurisdiction in personam. There can be no doubt that Dr. Lushington's opinion, expressed in *The Volant* (3), that "the jurisdiction of this Court does not depend upon the existence of the ship, but upon the origin of the question to be decided, and the locality," correctly represents the law. (4)

The view of Sir John Nicholl was, I think, in harmony with that of Lord Stowell. In the case of *The Triune* (5), which was an action for damage by collision, against the master, who was also part owner, the value of the ship arrested falling short of the damage, which was assessed at 400*l.*, Sir John Nicholl, treating the defendant as master, and so not protected by 53 Geo. 3, c. 159, s. 1, monished him to pay that sum of 400*l.*, and, failing to do so, he was imprisoned.

The argument before me turned chiefly on the decisions of

(1) 1 Hagg. Adm. 109.
(2) 15 M. & W. 391.
(3) 1 W. Rob. 383, at p. 388.
(4) See per Story, *De Lovio* v. *Boit*, 2 Gallison, 397, at pp. 461, 464.
(5) 3 Hagg. Adm. 114.

1892

THE DICTATOR.

Jeune, J.

Dr. Lushington. It must, I think, be admitted that they are not consistent, and it is this inconsistency that has necessitated a more general view of the subject than would otherwise have been necessary; but in view of the authorities I have referred to, I am, I think, justified in giving the preponderance to those expressions of his opinions which support them; and I think it will also be found that the earliest and latest views of Dr. Lushington were in harmony with those of Lord Stowell and Sir John Nicholl.

In *The Aline* (1), decided in 1839, Dr. Lushington said (2): "Independent of any municipal regulation, it is, I apprehend, one of the great principles of justice, that in cases of this description, where the wrong is done by the servants of the owner, the owner ought to make good the whole loss occasioned by their default. In the Courts of Common Law, where the proceedings are in personam, the operation of this principle would be carried out in its fullest extent, unless restrained by Act of Parliament. In these Courts, however, where the proceedings are in rem, a mode of remedy not originally given as the measure of the damage, but as the best security for indemnity that could be obtained, as the owner might be beyond the reach of the law"—(a statement, I venture to think, historically correct)—"the application of this principle has been modified"—how? Not, Dr. Lushington says, by the nature of the action, but "by municipal regulation, and a restriction is imposed limiting the liability of the owner of the ship doing the damage to the value of the vessel itself, and of the freight, where the freight can be attached. Under this modification, therefore, the rights of a person in possession of a decree of this Court in a cause of damage are co-extensive with the rights of the owner in the vessel against which the decree has been awarded." This is almost an echo of the words of Lord Stowell. I do not think that the case of *The Hope* (3), decided in 1840, asserts any contrary principle. It decided that the owners of a ship, having been sued as owners, and so entitled to avail themselves of the protection of the statute (53 Geo. 3, c. 159, s. 1), judgment could

(1) 1 Wm. Rob. 111. (2) At pp. 117, 118.

(3) 1 Wm. Rob. 154.

not be obtained against the master, who was also a part owner, beyond the value of the res, and so far it perhaps differed from the case of *The Triune* (1), which was not cited in argument. But although Dr. Lushington said that he was not aware of any case in which the Court, in a proceeding of that kind, had ever engrafted upon it a further proceeding against the owners, upon the ground that the proceeds of the vessel proceeded against were insufficient to answer the full amount of damage pronounced for, this falls short of saying that, apart from the statute, the owners were not liable in an action in rem for damage beyond the value of the res. In the *Volant* (2), however, decided in 1842, it cannot be doubted that Dr. Lushington departed from the view of Lord Stowell, basing his opinion on the very inference from the style of the Court which Lord Stowell had deprecated. He said (3): "In a case where the owner has appeared, the question is to what extent he has appeared to the process against the ship. It is material to see how that process is worded. 'It decrees the ship to be seized, and it cites all persons having, or pretending to have, any right, title, or interest therein to appear in this Court, on certain days and hours, there to answer in a cause civil and maritime.' The owners are only called in respect to any right, title, and interest, in order that they may appear and intervene for their interest in the vessel and not further. Now, if it were possible, on such warrant, to demand bail beyond the value of the ship, or if the process against the owners went to make them responsible beyond the value of the ship, there could be no reason why bail should not be commensurate with the damage, where the amount is not restricted by statute; but if bail could not be demanded beyond the value of the ship, I do not see how the owners, in that proceeding, can be made further responsible; the warrant of arrest is confined to the ship, it goes no further. It appears to me, therefore, that there is no personal liability beyond the value of the ship for this obvious reason, that the original process would not justify any such proceeding; the appearance given by the individual himself would not justify such proceeding; he has appeared only to

(1) 3 Hagg. Adm. 114.

(2) 1 Wm. Rob. 383.

(3) At p. 388.

1892

THE DICTATOR.

Jeune, J.

protect his interest in the ship." It is true that it was not necessary for the decision of this case to say more than Dr. Lushington said later in his judgment, that to render a master, part owner, guilty of neglect, responsible beyond the value of the ship and freight, he must be sued as master in the first instance; and it is true also that in a later case—the *Temiscouata* (1)—Dr. Lushington seems to explain his decision in the *Volant* (2), very much as he had expressed himself in the *Aline* (3), as based on the restriction of liability effected by the Act of Parliament, and not on the nature of an action in rem; but I do not think that on those grounds we can refuse to acknowledge the weight of Dr. Lushington's opinion, expressed in the words I have quoted. A similar expression of opinion is to be found in the case of the *Kalamazoo*. (4) Again, the actual decision is not in point, because all that was decided was that a ship having been released on bail could not be re-arrested in a fresh action where the compensation found due exceeded the bail. But Dr. Lushington took occasion to say (5): "It is said that the party ought to receive the whole amount of the damage done to the full extent of the value of the ship in fault. To this there are two answers: First, it was their own fault if they did not arrest her to the full value of the ship; and, secondly, there is no authority to shew that, having obtained bail for the ship, you can afterwards proceed against the owners to make up the amount of the loss. I cannot think that I can engraft a personal action upon an action in rem." But in the case of *The Zephyr* (6), decided in 1864, Dr. Lushington gave a decision, the reason for which appears to me not to be in accordance with his view as expressed in *The Volant* (2) and *The Kalamazoo* (4), and which, if correct, is conclusive in favour of the present application. The action for damage in that case was entered for 700*l.*, and the *Zephyr* was arrested. The liability of the owners under the 54th section of the Merchant Shipping Act, 1862, was 712*l.*, and exceeded the value — 400*l.* — of the ship, for which bail was given. The application made was to amend the præcipe by

(1) 2 Spinks, 208, at p. 210.
(2) 1 Wm. Rob. 383.
(3) 1 Wm. Rob. 111.
(4) 15 Jur. 885.
(5) At p. 886.
(6) 11 L. T. (N.S.) 351.

1892

THE DICTATOR.

Jeune, J.

inserting therein the names of the owners, and for a citation in personam against them. Dr. Lushington refused the application on the express ground that it was unnecessary. He said: "I have only known of one instance in which a personal action has been engrafted on a suit in rem. There is some difficulty in altering the præcipe as prayed, and such a course appears to the Court unnecessary, inasmuch as the 15th section of the Admiralty Court Act, 1861, gives the Court power to effect the object with which the motion has been made. That section puts decrees of the Court of Admiralty upon the same footing as judgments in the Superior Courts of Common Law, and gives a remedy as well against the ships and goods arrested as against the person of the judgment debtor. If, therefore, the occasion should arise, a monition might issue to compel the owner of the *Zephyr* to pay the amount of damages not covered by the bail bond." I confess I am unable to attribute to the 15th section of the Act of 1861 the effect which Dr. Lushington is reported to give to it. It seems to me only to arm the Court of Admiralty, which then could enforce its order for payment only by attachment, with the same powers of execution as are possessed by the Superior Courts; and if the objection to proceedings against the owners in that action for any sum over 400*l.* really depended on its being impossible to graft an action in personam on an action in rem (the phrase employed by Dr. Lushington in *The Hope* (1) and *The Kalamazoo* (2), and in argument in *The Victor* (3)), it appears to me that that objection would equally apply whether the proceeding was by way of fi. fa. or by way of monition and attachment.

I cannot help thinking that the fallacy lies in considering that to enforce a judgment beyond the value of the res, against owners who have appeared and against whom a personal liability, enforceable by Admiralty process, exists, is the grafting of one form of action on to another. The change, if it be a change, in the action, is effected at an earlier stage, namely, when the defendant, by appearing personally, introduces his personal liability.

It appears to me that the meaning of Lord Stowell's opinion,

(1) 1 Wm. Rob. 154. (2) 15 Jur. 885.

(3) Lush. 72.

1892

THE DICTATOR.

Jeune, J.

as above quoted, is that the judgment can be so enforced in the action in which the ship is arrested, and that in the case of *The Zephyr* (1), Dr. Lushington really intended to follow that opinion, and to adhere to his own opinion in *The Aline*. (2)

I do not think that the opinion of the Privy Council in *The Bold Buccleugh* (3) militates against this view. In that case the Privy Council, disapproving the decision of Dr. Lushington in *The Volant* (4) and the *Johann Friederich* (5), that the arrest of the res operated only to compel appearance in a manner analogous to the procedure in foreign attachments, and to furnish security for prompt and immediate payment, and also the decision in *The Aline* (6), that a lien attached only upon action brought, held that a maritime lien attached from the time of damage done, that a maritime lien was the foundation of the proceeding in rem, and that an action in rem was a process to make perfect a right inchoate from the moment the lien attached. In *The Parlement Belge* (7) it was said (8) that *The Bold Buccleugh* (3) decides that "an action in rem is a different action from one in personam and has a different result." But I do not think it follows, or that the Privy Council or the Court of Appeal intended to lay down that an action in rem could affect only the res. It may well be that, if the owners do not appear, the action only enforces the lien on the res, but that, when they do, the action in rem not only determines the amount of the liability, and in default of payment enforces it on the res, but is also a means of enforcing against the appearing owners, if they could have been made personally liable in the Admiralty Court, the complete claim of the plaintiff so far as the owners are liable to meet it. It appears to me consonant with common sense that if the owners have had no personal notice, and are not, save in the sense indicated in *The Parlement Belge* (7) before the Court, the effect of its judgment should be limited to the res in its hand, but that, if the owners appear to contest or reduce their liability, they should be placed in the

(1) 11 L. T. (N.S.) 351.
(2) 1 W. Rob. 111.
(3) 7 Moo. P. C. C. 267.
(4) 1 Wm. Rob. 383.
(5) 1 Wm. Rob. 35.
(6) 1 Wm. Rob. 111.
(7) 5 P. D. 197.
(8) At p. 219.

1892

THE DICTATOR.

Jeune, J.

same position as if they had been brought before the Court by a personal notice.

It was argued by Sir Walter Phillimore, that the fact that a mortgagee is entitled to appear shews that appearance is limited to the interest in the res, but a mortgagee has no interest in or connection with the action beyond his interest in the res, nor could he by any process be fixed with any further liability.

It was admitted in argument that an owner by appearing renders himself liable to costs over and above the value of the res. It is clear, however, that the authorities, which decide that this liability for costs undoubtedly exists, distinguish between that and the liability for damages: *The John Dunn* (1), *The Volant* (2), *The Temiscouata* (3), and *The Freedom.* (4)

I do not forget that modern text-writers (5) have adopted the view that the remedy afforded by proceedings in rem cannot extend beyond the property proceeded against. But it appears to me that the point was never specially considered, and that the opinion expressed proceeded chiefly, if not entirely, upon the decisions in *The Hope* (6), *The Volant* (2), and *The Kalamazoo.* (7)

Even if, however, it be held that the remedy in actions in rem is limited by the value of the res, it is necessary for the defendants in the present case, in which the value of the res far exceeds the salvage award, to maintain either that, when bail has been given, the limit is the amount of the bail, or that such limit is fixed by the original claim in the action.

With regard to the first of these propositions, it may well be that for certain purposes the bail represents the released res. This would appear to be so with regard to conferring freedom from re-arrest, according to the opinion expressed by Dr. Lushington in *The Wild Ranger* (8) and *The Kalamazoo* (7), though even this must be understood, as Dr. Lushington explained in *The Hero* (9), to apply only to applications made for re-arrest after final judgment, which the cases of *The Miriam* (10) and *The Freir* (11) shew

(1) 1 Wm. Rob. 159.
(2) 1 Wm. Rob. 383.
(3) 2 Spinks, 208.
(4) Law Rep. 3 A. & E. 495.
(5) Will. & Br. ed. 1886, pp. 81, 82, 302.
(6) 1 Wm. Rob. 154.
(7) 15 Jur. 885.
(8) Br. & L. 84, at p. 87.
(9) Br. & L. 447, at p. 448.
(10) 2 Asp. M. L. C. 259.
(11) 2 Asp. M. L. C. 589.

1892

THE DICTATOR.

Jeune, J.

to mean final judgment after an appeal, and not even then to be an invariable rule, as the judgment of the same learned judge in *The Flora* (1) shews; or to extend to re-arrest for the purpose of obtaining costs, as the judgment of Sir Robert Phillimore in *The Freedom* (2) suggests. Again; as held by Fry, L.J., in *The Christiansborg* (3), "bail is the equivalent of the res, and that whilst the bail has been given for the thing, it is, if not impossible, highly improper that another action should be allowed to go on against the res in any other place." Again; it would seem that if the res is of less value than the bail, the bail is so far identified with the res that the bondsmen are liable only up to the value of the res: *The Staffordshire.* (4) In these senses, and for these purposes, bail stands in the place of the res. But it is quite another thing to say that the liability of the owner is confined to the same amount as the liability of the bail, and that the ship or any other goods of the defendants cannot be taken in execution under the provisions which continue the powers given to the Admiralty Court by the Act of 1861, as Sir Robert Phillimore, in *The Freedom* (5), thought was possible as regards costs. The very form of the bail bond in the present day (6), and the early practice I have referred to in Clerke, seems to me to shew that the bail is liable in a specified amount for the payment by the defendants of the whole amount of the judgment. But, further, the case of *The Jonge Bastiaan* (7) seems to me to be in point, and indeed to be on all fours with the present case. There, a salvage action in rem having been entered for 800*l.* and bail given, which I presume was for the same amount, Lord Stowell held that "the Court is by no means limited by any particular demand of the parties," and awarded two-thirds of the value of the property salved, which was stated to be 3400*l.* Lord Stowell clearly in this case did not consider a fresh action necessary, though in another case, probably under different circumstances, Dr. Lushington is reported as saying that he had

(1) Law Rep. 1 A. & E. 45.
(2) Law Rep. 3 A. & E. 495, at p. 498.
(3) 10 P. D. 141, at p. 155.
(4) Law Rep. 4 P. C. 194, at p. 211.
(5) Law Rep. 3 A. & E. 495.
(6) R. S. C. 1883, App. A, pt. 2, No. 13.
(7) 5 C. Rob. 322.

done so. (1) *The Zephyr* (2) is of course a further authority to the same effect.

There remains only the question whether the amount of the original claim limits the amount of the enforceable judgment. I have no doubt that it does not. I think that, under the former practice, although Dr. Lushington, in *The Zephyr* (2), appeared to have doubted it, the claim in the præcipe could be exceeded with or without formal amendment. *The Jonge Bastiaan* (3) is a clear authority on this point. I regard *The Hero* (4) and *The Johannes* (5) as decisions to the same effect. But whether or no a præcipe could be so dealt with, the original claim now appears on the writ, and there is no doubt that a writ can be, and in this case has been, amended before final judgment.

I should have regretted if I had been unable to accede to the present motion, because, as it is clear that if a plaintiffs' claim is not satisfied by one kind of action, he can resort to another—*The Clara* (6); *The Orient* (7)—the only result of refusal would be to drive the plaintiffs to bring another action. But, for the reasons I have given, I think the present application may be granted, in order to enable the plaintiffs to issue execution in the present action for the full amount of the decree which they have obtained.

Solicitors for plaintiffs: *Lowless & Co.*

Solicitors for defendants, the owners of the *Dictator*, her cargo, and freight: *Wynne, Holme, & Wynne, for Simpson, North, & Johnson, Liverpool.*

(1) *Silver Bullion*, 2 Spinks, 70, at p. 75.
(2) 11 L. T. (N.S.) 351.
(3) 5 C. Rob. 322.
(4) Br. & L. 447.
(5) Law Rep. 3 A. & E. 127.
(6) Sw. 1.
(7) Law Rep. 3 P. C. 696.

T. L. M.

C. A.
1892
July 9.

[IN THE COURT OF APPEAL.]

THE CARL XV.

Admiralty—Collision—Compulsory Pilotage—Draught of Water—Merchant Shipping Act, 1854, *ss.* 2, 388—*Order in Council, May* 1, 1855, *Regulation* 4.

By s. 388 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), "No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship, within any district where the employment of such pilot is compulsory by law."

By the interpretation clause (s. 2) of the Act, the words "qualified pilot" shall "mean any person duly licensed by any pilotage authority to conduct ships to which he does not belong."

By the 4th of the Regulations approved by, and annexed to, the Order in Council, May 1, 1855, "No person licensed as a pilot for the London district . . . . shall take charge as such of any ship drawing more than fourteen feet water, in the River Thames or Medway, or any of the channels leading thereto or therefrom, until such person shall have acted as a licensed pilot for three years, and shall have been after such three years, on re-examination, approved of in that behalf by the said Trinity House, on pain of forfeiting 10*l.* for every such offence, unless there shall be no qualified pilot to be obtained who has passed the said examination for ships drawing more than fourteen feet water."

In an action of damage by collision, the Court found that the collision, which took place in the London District, between the plaintiffs' vessel and the defendants' vessel, was caused solely by the negligence of the pilot of the defendants' vessel.

The defendants' vessel—a foreign ship, with passengers—drew sixteen feet nine inches aft; but the pilot was not licensed to take charge of a vessel drawing more than fourteen feet water. It was, however, admitted that, when the pilot boarded the vessel, no pilot qualified for vessels drawing more than fourteen feet was left for service:—

Held, by the Court of Appeal—affirming the judgment of the President (ante, p. 132)—that the defendants' plea of compulsory pilotage must be sustained, as the effect of the clause in the Order in Council—"unless there shall be no qualified pilot to be obtained who has passed the said examination for ships drawing more than fourteen feet water"—when read into the license, and by the light of the Act of Parliament, was to render the pilot qualified, and his employment compulsory.

Semble, a pilot qualified to conduct ships drawing more than fourteen feet water would have a right to supersede the pilot in charge who was not so qualified; but the latter would be entitled to a fair proportion of the pilotage fees.

APPEAL by plaintiffs, in an action of damage by collision, against a decision of the President (Sir Charles Butt) sustaining the defendants' plea of compulsory pilotage.

The facts, so far as material, are fully set out in the report of the case in the Court below (1), and were shortly, that:—

On January 12, 1891, about 11.45 A.M., a collision occurred in Erith Reach in the River Thames between the plaintiffs' steamship *Angelus*, proceeding from the Tyne to London, and the *Carl XV.*, a Swedish steamship, belonging to the defendants, of 721 tons register, and a crew of eighteen hands, from Gothenburg to London, with a general cargo and nine passengers.

On November 20 and 21, the action, brought by the owners of the *Angelus* against the owners of the *Carl XV.*, was tried before the President (Sir Charles Butt) assisted by two of the Elder Brethren of the Trinity House, and the Court found that the collision was caused by the wrongful navigation of the *Carl XV.*, but that there was no negligence on the part of her officers or crew, causing or contributing to the collision, the fault being that of the pilot alone.

On this finding the defendants would have been entitled to judgment in their favour, if the pilot of the *Carl XV.* was duly qualified.

The license of the pilot was dated June 25, 1890, and the material portion was as follows: "We, the Trinity House . . . . do hereby appoint and license the said Joseph James Acland Mitchell, to act as a pilot for the purpose of conducting ships from London Bridge down the River Thames to Gravesend, and back again to London Bridge . . . . PROVIDED ALWAYS *that this license shall not authorize or empower* the said Joseph James Acland Mitchell *to take charge as a pilot of any ship or vessel drawing more than* FOURTEEN FEET WATER *in the River Thames or Medway, or any of the channels leading thereto or therefrom, until it shall be certified hereon that the said* Joseph James Acland Mitchell *has acted as a licensed pilot for three years, and has been, on re-examination, approved of in that behalf by* US *the said* TRINITY HOUSE."

The draught of water of the *Carl XV.* was 16 ft. 9 in. aft; but when the "under book" pilot, Mitchell, boarded the vessel at Gravesend, no "upper book" pilot was left for service—that is, a pilot authorized to pilot vessels of any draught, and therefore qualified for vessels drawing more than fourteen feet water.

(1) Ante, p. 132.

C. A. 1892 THE CARL XV.

On December 8, the question of law—whether or not the pilot was duly qualified to act as such and was therefore employed at the time and place of the collision by compulsion of law—was argued, and on April 1 the President gave judgment in favour of the defendants, on the ground that the effect of ss. 2 and 388 of the Merchant Shipping Act, 1854 (1), coupled with paragraph 4 of the Order in Council, May 1, 1855 (2), was to qualify the pilot pro hac vice to conduct ships of a greater draught than fourteen feet.

On appeal:—

Cohen, Q.C. (*J. P. Aspinall*, with him), for the appellants (plaintiffs). The defence of compulsory pilotage fails, because the *Carl XV.* admittedly drew more than fourteen feet, and there was no certificate in the terms of the proviso, indorsed on the license of the pilot, to the effect that he had acted for three years and been re-examined, so as to be qualified to take charge of a ship drawing more than fourteen feet water. The defendants, therefore, cannot bring themselves within s. 388 of the Merchant Shipping Act, 1854, for that section only relieves them from liability where the loss or damage is occasioned by the fault or incapacity of "any qualified pilot;" and the penalties for not employing pilots imposed on masters by ss. 353 and 376 of the same statute are only enforceable if "a qualified pilot has offered to take charge." By the interpretation clause (s. 2)

(1) 17 & 18 Vict. c. 104, s. 388: "No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law."

Sect. 2: ". . . . qualified pilot shall mean any person duly licensed by any pilotage authority to conduct ships to which he does not belong."

(2) Order in Council, May 1, 1855, Regulation 4: "No person licensed as a pilot for the London district . . . . shall take charge as such of any ship drawing more than fourteen feet water, in the River Thames or Medway, or any of the channels leading thereto or therefrom, until such person shall have acted as a licensed pilot for three years, and shall have been after such three years, on re-examination, approved of in that behalf by the said Trinity House, on pain of forfeiting 10*l.* for every such offence, unless there shall be no qualified pilot to be obtained who has passed the said examination for ships drawing more than fourteen feet water."

of the Act, "qualified pilot" means a person "duly licensed," which this pilot was not, as his license only enabled him to pilot ships not drawing more than fourteen feet water. The law is thus stated by Dr. Lushington in *The Maria* (1): "If the taking a pilot on board was compulsory, and the collision was occasioned by the fault of that pilot, I shall hold the owner of the *Maria* exempt from responsibility, upon general principle, without reference to Acts of Parliament, for in that case the pilot was not their servant, and the maxim, 'Qui facit per alium facit per se,' does not apply. If, on the contrary, the taking a pilot was voluntary, then he was the servant of the owners, and the owners are responsible."

The provisions of the earlier general Pilot Act differ from those of the Merchant Shipping Act, as Dr. Lushington, and the Privy Council, have pointed out, in that the later Act applies only where the pilot is in charge by compulsion of law, and not also where he may be in charge by the shipowner's appointment.

The pilotage authority responsible for the pilot's license now in question had power conferred on it by sub-s. 1 of s. 333 of the Merchant Shipping Act, 1854, to determine the qualifications in respect of (inter alia) time of service to be required from persons applying to be licensed as pilots, and under those powers the pilotage authority made the regulation No. 4, which is annexed to the Order in Council of May 1, 1855, and by that regulation the pilotage authority has determined that the pilot in question would have to wait two years more before he could qualify to take charge of a vessel of the draught of the *Carl XV.*

[LORD ESHER, M.R. The Order in Council goes on to say, "unless there shall be no qualified pilot to be obtained who has passed the said examination for ships drawing more than fourteen feet water;" that makes this pilot on this occasion qualified.]

No, that only relieves the pilot from the penalty; the master is not subject to any penalty if he does not employ him, so that his employment is not made compulsory on the owner. This pilot, being unqualified for a ship of the draught of the *Carl XV.*, was liable to be superseded by a qualified pilot, under s. 360 of the

(1) 1 Wm. Rob. 95, at p. 107.

C. A. 1892

THE CARL XV.

Merchant Shipping Act, 1854. Being an unqualified pilot, the master might have refused to employ him, and waited for a pilot qualified to conduct ships drawing more than fourteen feet water. His employment being, therefore, voluntary, the defendants are liable to the plaintiffs for the damages arising out of this collision.

Witt, Q.C., and *Stubbs*, for the respondents (defendants), were not called upon.

LORD ESHER, M.R. We think that the judgment of the late President was right.

In order to understand the matter, the Order in Council and the statute must be read together, for the Court cannot suppose that the Order in Council was intended to supersede the Act of Parliament. If it was so intended, wherever it tried to do so, to my idea, it would be wrong and ultrà vires, for you cannot by an Order in Council supersede an Act of Parliament; they must be read together.

Under the Act of Parliament—that is, s. 369 of the Merchant Shipping Act, 1854—the Trinity House is empowered to provide for the appointment in the districts there referred to, of qualified pilots; and by s. 370 provision is made for licensing pilots in the London district, after due examination by the Trinity House. If the pilot is being examined so as to be appointed a qualified pilot within the London district, he is examined by the Trinity House for the purpose of seeing whether he is fit to conduct ships within that district. When is a man fit to conduct ships within a district as pilot? He must know how to steer a ship; he must know the different manner of steering a ship which has a screw, and steering a sailing ship. He must know all that as part of the navigation. What else must he know? He must know all the shoals and all the sands, and all the difficulties of the navigation of the district. The mode of steering, or how the particular ship steers under certain circumstances is known to the master of the ship and the crew of the ship, and where the knowledge of the navigation depends upon the peculiarity of the ship, at all events the master and those on board the ship know as much about the management of the ship as

C. A. 1892

THE CARL XV.

Lord Esher, M.R.

the pilot does, so that, when the pilot gives an order as to the management of a ship, it is the master who has to carry it out. The master is bound to be there, or an officer, to assist the pilot in those duties. But when you come to the knowledge of the shoals and the sands and the currents, they are matters which the master of the ship very often knows nothing about. Supposing it is a foreign ship, or supposing it is a ship whose navigation has been otherwise than in the London district. A master may be one of the best qualified masters in the mercantile navy, but who has not been in the Thames before. Then he knows nothing about the shoals or sands or currents, but the pilot knows all about them, and no man is allowed to be appointed a pilot at all in the London district who has not that peculiar knowledge which the master has not. The Act of Parliament deals with the matter in this way. By the interpretation clause in s. 2 of the Act, "qualified pilot shall mean any person duly licensed by any pilotage authority to conduct ships to which he does not belong;" and by s. 365, a qualified pilot is bound under a penalty "to take charge of any ship within the limits of his license upon the signal for a pilot being made by such ship." Then, by s. 376, the master of a ship, not otherwise exempted, navigating within the London district, is bound under a penalty to take "a qualified pilot" who "has offered to take charge of such ship, or has made a signal for that purpose." Then comes s. 388, by which "no owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship, within any district where the employment of such pilot is compulsory by law."

Therefore, if a master in the London district takes a qualified pilot on board to conduct his ship, he is exempt from any default or incapacity of the pilot. How reasonable the law is in that! I have pointed out what it is that the pilot knows; what it is he is held out by the authorities to know; what he, and he alone, knows, and to say then that the master or owner shall be made liable if the ship runs aground, or does anything which is the result of the fault of the pilot alone, would be shocking.

According to the Act of Parliament, this pilot was a qualified

C. A. 1892

THE CARL XV.

Lord Esher, M.R.

pilot. There cannot be a doubt about that, because he had been examined by the Trinity House, and had got a license to conduct ships within the district. Is there anything in the Order in Council which says that he was not a qualified pilot within the meaning of the statute? We have heard that read, but it is to be read with the Act. It is to be read, therefore, as applying to a man who has passed the examination; and we construe that with this view, that the Order in Council, we may be quite certain, was not intended to contravene anything in the statute. The paragraph of the Order in Council is this: "No person licensed as a pilot"—that is, no person who has passed the examination before the Trinity House, and has obtained his license, that is a qualified pilot within the statute "within the London district"—that is a person licensed to conduct ships while they are within the London district, "shall take charge as such of any vessel drawing more than fourteen feet of water in the River Thames or Medway, or any of the channels leading thereto or therefrom, until such person shall have acted as a licensed pilot for three years, and shall have been, after such three years, on re-examination approved of in that behalf by the said Trinity House, on pain of forfeiting 10*l.* for every such offence, unless there shall be no qualified pilot to be obtained who has passed the said examination for ships drawing more than fourteen feet of water." What is the meaning of the word, "unless," there? When you have the word "unless" in the English language, it carries with it that, if something happens, then what has been said before will not apply. That is, the meaning is, that he is not to take charge of the ship if there is one of the other pilots available; but if there is no other pilot available, then he is to take charge, and must take charge, and shall take charge. Therefore, here, the pilot was entitled to take charge of the ship; the master was bound to take the pilot if the pilot offered himself. The pilot was a compulsory pilot within the statute, and within the statute the owner was not liable for any accident which happened by reason solely of the fault of the pilot.

I think the judgment of the late President of the Admiralty Division was quite right, and that this appeal must be dis-

missed. It is said that a difficulty may some day arise if one of the pilots has charge of a ship at the beginning of its navigation, and then a pilot of another class comes who offers to take the ship. In my opinion, although it is not necessary to decide it, I am inclined to think that then the one who was qualified to navigate the ship, if she is over fourteen feet, would have a right to take charge, and the master would have to give him the charge, but the other pilot would be entitled to a fair proportion of the pilotage fees. I should think so; but, as it is not necessary to decide it, it is better for the Court to say they do not decide that point now.

BOWEN, L.J. I am of the same opinion. The question arises under s. 388: "No owner or master of any ship shall be answerable to any person whatever, for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law."

If the pilot was a qualified pilot, the ship here was bound to employ him, and he was bound to serve. Was he a qualified pilot? I am of opinion that the true construction of the Order in Council, read by the light of the Act, and of the license, which, I think, has to be read also by the light of the Act of Parliament, is that this person was a qualified pilot; and I think that all pilots in his capacity, and in his condition, are qualified pilots for the purpose for which this person was acting, unless there is another pilot obtainable who possesses superior qualifications.

That is the short sense of the thing. The man was not unqualified; he was qualified, but he would cease to be capable of acting if there was one more qualified present, and capable of being obtained. I think he was a qualified pilot, because, in the first place, he was a licensed pilot. A "qualified pilot," by s. 2 of the Act, is defined as "any person duly licensed by any pilotage authority to conduct ships to which he does not belong." Next let us see whether the Order in Council, and the license, prevent him from being a qualified pilot under the circumstances?

The Order in Council does not appear to me to do anything

C. A. 1892

THE CARL XV.

Bowen, L.J.

except prevent qualified pilots from acting in particular situations—that is to say, when somebody better can be had. If you cannot get anybody better, it leaves him to my mind free and compellable to act. The Order in Council is as follows: "No person licensed as a pilot for the London district shall take charge" who has not been three years a licensed pilot, and has not been re-examined "unless there shall be no qualified pilot to be obtained who has passed the said examination." Reading that in the ordinary sense in which language is to be read, it means that there are qualified pilots of two kinds. There is the qualified pilot who is always capable of acting. There is also the qualified pilot who is liable to be superseded if you can obtain a better. The qualified pilot who is liable to be superseded, if a better can be obtained, becomes disqualified if a better can be obtained, or, rather, becomes incapable of acting lawfully under the section if a better can be obtained. Such is the true construction of the Order in Council. But the license, it has been said—quite apart from the Order in Council—shews that he only has a qualification of a peculiar kind, which prevents him from being a qualified pilot at all. That, to my mind, is not the true construction of the license. In the first place, I think that the license must be read by the light of the Order in Council. It is unintelligible otherwise. It is a license under the seal of the Trinity House, and it appoints Mitchell to act as a pilot for conducting ships from London Bridge down the river to Gravesend and back; and, unless it be revoked or suspended, in the way provided, it is to continue in force till January 31, after the date on which it is given, and then it may be renewed from time to time by indorsement.

It contains a proviso which limits the action of the pilot under the license. It is not to be deemed to authorize him to take charge as a pilot of a vessel drawing more than fourteen feet until he has acted for three years as a licensed pilot. If that stood alone, there might be a difficulty; but I think that it is not intended to stand alone. The license issued by the Trinity House must be read with the Order in Council, and it must mean, I think, that the modification which the Order in Council introduces in its last clause, beginning with the word "unless,"

does empower a man to take charge in the case indicated. Accordingly, on the true construction of the law, I think this pilot was a qualified pilot whenever there was nobody better qualified to take charge. I do not know whether there is a good reason for it; but, unless there is, it is rather unfortunate that the license does not mention this part of the Order in Council, but leaves it out. What the reason of that is I do not know.

KAY, L.J., concurred.

Appeal dismissed.

Solicitors for appellants, the owners of the *Angelus: Thomas Cooper & Co.*

Solicitors for respondents, the owners of the *Carl XV.: Pritchard & Sons.* T. L. M.

THE SALTBURN.

1892 *June* 22.

Admiralty—Collision—Practice—Amount recovered under 300*l.*—*Costs—The County Courts Admiralty Jurisdiction Act*, 1868 (31 *&* 32 *Vict. c.* 71), *s.* 3, *sub-s.* 3, *and s.* 9.

In an action of damage by collision, the hearing lasted five hours, and the decision mainly turned on the inability of the defendants to exonerate their steamship from the charge of not keeping out of the way of the plaintiffs' steamer, a large vessel in tow of tugs, and which the defendants' steamer was overtaking in the river Thames. In the result the defendants' vessel was held alone to blame, and the damages were referred in the usual way to the registrar and merchants.

The plaintiffs filed their particulars of claim amounting to 339*l.* 15*s.* 7*d.*, but the reference was not proceeded with as the parties agreed the damages at 226*l.* 5*s.*

On motion on behalf of the plaintiffs, to condemn the defendants and their bail in that amount, with interest, and in the costs of the action, the defendants contended that the plaintiffs were not entitled to their costs, as the amount recovered was under the statutory county court limit of 300*l.*, and, therefore, the action ought to have been brought in a county court:—

Held, that the plaintiffs were entitled to their costs, for the discretion of the Court in allowing, or refusing, costs now depends upon whether, considering the facts and the circumstances of the particular case, the plaintiffs have acted properly and reasonably in bringing their action in the High Court, and—considering the size of the vessels, the nature of the collision, the length of time the hearing lasted, and the judgment pronounced—this case was a proper one to be tried in the High Court.

MOTION by plaintiffs, after a decree in their favour, in an action of damage by collision, to condemn the defendants and

1892

THE SALTBURN.

their bail in the sum of 226*l.* 5*s.* agreed damages and interest thereon, and in the costs of the action.

The facts, so far as material on the question of costs, were shortly that:—

On September 26, 1891, about 8.30 P.M., the steamship *Mentmore*, belonging to the plaintiffs, of 2231 tons net register, and forty hands, was proceeding in charge of a pilot down the river Thames, from Deptford to the Royal Albert Docks, with one tug ahead and another lashed to her starboard side, when, just below Blackwall Point, she came into collision with the defendants' steamship *Saltburn* of 1288 tons gross, and 837 tons net, register, and eighteen hands, from the Surrey Commercial Docks to the Tyne in charge of a pilot.

On December 3 the plaintiffs, the owners of the *Mentmore*, issued a writ in rem indorsed with a claim for 1500*l.*, and, by their statement of claim, the plaintiffs charged the *Saltburn* with (1.) bad look-out, (2.) improperly failing to keep clear of the *Mentmore*, (3.) not stopping and reversing, (4.) non-compliance with arts. 14 and 16 of the Thames Bye-Laws, 1880.

By their defence and counter-claim, the defendants, the owners of the *Saltburn*, charged the *Mentmore* with (1.) bad look-out, (2.) not keeping her course, (3.) negligence of plaintiffs' tug, (4.) non-compliance with art. 14 of the Thames rules.

By their reply the plaintiffs set up compulsory pilotage.

On March 24 and 25, 1892, the action was tried by the President (Sir Charles Butt), assisted by two of the Elder Brethren of the Trinity House. The hearing lasted from 12.15 to 4 P.M. on the first day, and from 10.30 to 11.45 A.M. on the next day. There were five witnesses examined in Court on each side; the principal witness of the defendants, the master of the *Saltburn*, having been previously examined.

The President thereupon gave judgment, dealing particularly with the duty of the *Saltburn*, as the overtaking ship, to keep out of the way of the *Mentmore*, and—after ascribing the cause of the collision to reckless navigation on the part of the *Saltburn* in going at an improper rate of speed, and attempting to pass, at that point in the river, such a large ship as the *Mentmore*, with her tugs—the learned judge pronounced the *Saltburn* alone to

1892

THE SALTBURN.

blame, and referred the damages, in the usual way, to the registrar and merchants.

The plaintiffs thereupon filed their particulars of claim, amounting to 339*l.* 15*s.* 7*d.*; but the reference was not proceeded with, as the parties agreed the damages at 226*l.* 5*s.*, the question of costs being reserved.

Sir Walter Phillimore, in support of the motion, on behalf of the owners of the *Mentmore*. The plaintiffs could not have brought their action in the county court, as the amount shewn by their particulars of claim exceeded the jurisdiction of that court, and though the plaintiffs have agreed to accept a sum which is under the statutory limit, still, considering that the issues raised involved the Thames rules, that there was considerable conflict of evidence, that there was a counter-claim, that the trial lasted parts of two days, and that a substantial amount has been agreed to as the damages, it was reasonable for the plaintiffs to bring their action in the High Court. The question of the allowance of costs is now purely one of discretion, unfettered by s. 9 of the County Courts Admiralty Jurisdiction Act, 1868, as that section of the Act is, by implication, repealed by the Rules of the Supreme Court, 1883, and the rule apparently laid down in *The Asia* (1) is not binding, See *Rockett* v. *Clippingdale* (2), and the remark of Lord Esher, M.R., at the end of the judgments. (3) If the Court is of opinion that this was a fit case to be tried before it, that is enough to carry costs: *The Williamina.* (4)

Myburgh, Q.C., for the defendants, the owners of the *Saltburn.* The plaintiffs are not entitled to any costs. They brought their action for 1500*l.*, but their particulars of claim only amounted to 339*l.* 15*s.* 7*d.*, and as this included a large sum for demurrage at 6*d.* a ton per day, which the plaintiffs did not attempt to substantiate before the registrar, they must have known all through that they had no reasonable expectation that their claim would exceed 300*l.* The action was an ordinary Thames collision, and the City of London Court would have been a most efficient

(1) [1891] P. 121.
(2) [1891] 2 Q. B. 293.
(3) At p. 300.
(4) 3 P. D. 97.

1892

THE SALTBURN.

tribunal for the trial. The onus is on the plaintiffs to shew that they were justified in instituting proceedings in the superior Court, instead of availing themselves of the cheaper forum provided by the legislature. They have failed to shew any special circumstances, and therefore they must be deprived of costs in accordance with the decisions in *The Herald* (1) and *The Asia.* (2) These cases are not overruled by *Rockett* v. *Clippingdale* (3) as that case only deals with actions tried in the Queen's Bench Division. [The case of *The Zeta* (4) was also referred to.]

GORELL BARNES, J. (after referring to the nature of the case proceeded). The only question that I have to determine is, whether the successful party—the *Mentmore*—is entitled to her costs in the High Court in this action. I have looked through the cases mentioned in the course of the argument of the learned counsel, and I do not think there is any substantial difference between them as to the principle which should be applied. The question, I think, which has to be determined by the judge is whether or not the plaintiffs have acted properly and reasonably in bringing their action in the High Court. The cases which have been cited do not really help one in determining any particular case. In my opinion, each must depend on its own facts, and those facts must be considered, having regard to the principle I have just indicated, and which seems to run through all these cases, expressed in one form or another. What facts will shew that the plaintiff has reasonably and properly brought his action in the High Court must vary considerably in the different cases, and it is difficult to lay down with precision what facts and what state of circumstances will so justify him. In such cases, as I have said, the result must depend on the consideration of the general facts; and in my judgment, in this case, having regard to the size of these vessels, the nature of the collision, the length of time which the hearing lasted, and the judgment of the President which I have read, I think this case was a proper one to bring

(1) 63 L. T. (N.S.) 324.
(2) [1891] P. 121.
(3) [1891] 2 Q. B. 293.
(4) [1891] P. 216; since reported on appeal [1892] P. 285.

in the High Court. I give judgment for the plaintiffs in the terms of the notice of motion, with costs. 1892

THE SALTBURN.

Solicitors for plaintiffs: *Pritchard & Sons, for Bateson, Warr, & Bateson, Liverpool.*

Solicitors for defendants: *Botterell & Roche.*

T. L. M.

THE WILHELM TELL.

1892

July 12, 26.

Admiralty — Salvage — Apportionment — The Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *s.* 182—*The Merchant Shipping Act Amendment Act*, 1862 (25 & 26 *Vict. c.* 63), *s.* 18—*The Merchant Shipping (Fishing Boats) Act*, 1883 (46 & 47 *Vict. c.* 41), *s.* 13—*Agreement to accept Percentage of Salvage.*

By the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 182, " . . . every stipulation by which any seaman consents to abandon . . . any right which he may have or obtain in the nature of salvage, shall be wholly inoperative."

By the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), s. 18, the 182nd section of the Act of 1854 " does not apply to the case of any stipulation made by the seamen belonging to any ship, which, according to the terms of the agreement, is to be employed on salvage service, with respect to the remuneration to be paid to them for salvage services to be rendered by such ship to any other ship or ships."

By the Merchant Shipping (Fishing Boats) Act, 1883 (46 & 47 Vict. c. 41), s. 13: " The skipper of every fishing boat shall enter into an agreement with every seaman . . . whom he carries to sea from any port in the United Kingdom as one of his crew, and every such agreement shall be in a form sanctioned by the Board of Trade, . . . and shall contain the following particulars . . . (5) the remuneration which each seaman is to receive, whether in wages or by a share in the catch, or in both ways . . . and every such agreement shall be so framed as to admit of stipulations, to be adopted at the will of the skipper and seaman in each case, as to advance and allotment of wages, and may contain any other stipulations which are not contrary to law."

By articles of agreement in the form sanctioned by the Board of Trade under the above Act, " . . . every member of the crew, including apprentices, shall be regarded as entitled to participate in any sum or sums of money arising from any salvage or salvage services performed for any ship in distress or otherwise in the proportion set forth opposite to their respective names in this agreement."

Salvage services were rendered in the North Sea to a sailing vessel by several steam trawlers, and, in actions consolidated for the purpose of trial, awards were made to each of them.

The owners, master, and crew of one of these trawlers were awarded the sum of 1000*l.*, and, in accordance with the articles of agreement, the master, mate,

1892

THE WILHELM TELL.

and boatswain were entitled respectively to a share of salvage of 10, 7, and 3 per cent.

On motion on behalf of the master, mate, and boatswain, for such an apportionment, as to the Court should seem just, of the 1000*l.* less unrecovered costs, and for a declaration that the applicants were not bound by the articles to receive only the proportions of salvage set out therein against their respective names:—

Held, that, as s. 182 of the Act of 1854 did not prevent seamen entering into an equitable arrangement for the apportionment of salvage, therefore, though the trawler in question was not within s. 18 of the amending Act of 1862, the apportionment of salvage contemplated by the articles was not contrary to law, and being, in the opinion of the Court, equitable, was binding.

The master and mate were paid wages on the footing of a share of the fishing profits, but the boatswain received so much per week; and the owners of the trawler, in arriving at the nett sum to be apportioned, claimed to deduct the cost of repairs for damage sustained by the vessel in rendering the salvage services, and as against the boatswain, certain other sums for loss of profits, time, &c.:—

Held, that these deductions could not be allowed, as the agreement for a certain share of the salvage meant a share of the sum awarded, less any unrecovered costs in obtaining the award.

Semble, the provisions of s. 182 of the Merchant Shipping Act, 1854, and of s. 18 of the amending Act of 1862, do not apply to a master.

MOTION on behalf of the master, mate, and boatswain of the steam trawler *Irrawaddy*, for apportionment of salvage.

The circumstances giving rise to the application were briefly as follows:—

On the night of December 7, 1891, the *Wilhelm Tell*—a new steel four-masted barque of 2932 tons nett register, which had just been delivered to her owners at a cost of 26,100*l.*—was proceeding from the builders' yard in Leith to Cardiff, in ballast, with a crew of twenty-six all told, including twenty riggers, and having on board a Trinity House pilot and the master's wife. The vessel was in tow of a tug; but there was a heavy north-easterly gale blowing at the time, and, the hawser having parted, the tug and tow lost sight of one another. The *Wilhelm Tell* then endeavoured to proceed under her own sail; but, the weather continuing bad, on the morning of the 11th, when on the Dogger Bank, the foremast carried away, the topmast and gear going overboard, and the foreyard falling on the deck. Shortly afterwards the main and mizzen topmasts came down, and went overboard, carrying with them a portion of the jigger topmast.

1892

THE WILHELM TELL.

The starboard anchor was then let go, and the vessel brought head to wind and sea; but the fallen wreckage causing a list to port, efforts were made to clear it, and about 3 P.M. the ensign was hoisted, union down, as a signal of distress.

A steam trawler then coming up, some of the crew of the *Wilhelm Tell* went off in a lifeboat to her, and, after getting on board, the lifeboat was caught by a sea and smashed.

Two other trawlers came up in the night, and on the following morning, the weather having somewhat moderated, efforts were made to clear away the wreckage; but the rolling of the vessel prevented much being done. About noon the three trawlers made fast, and, the anchor having been slipped, they attempted to tow towards the Humber, the vessel being then about 130 miles E. by N. of the Spurn. The effort, however, was unsuccessful, as, in spite of the assistance of two more trawlers, the vessel drifted to leeward, and, when it was getting dark, the crew of the *Wilhelm Tell*, having become demoralised, refused to work any longer, and hailed the trawlers' boats to take them off, which was done. The master of the vessel then decided to endeavour to procure assistance, and a steam trawler took him and his wife, the officers, pilot, and nine of the crew to Hull.

On the morning of the 13th the steam trawler *Irrawaddy*, belonging to the British Steam Trawling Company, Limited, of 54 tons register, a crew of nine hands all told, and of the agreed value of 3143*l.*, came up, and was followed by two other trawlers. From these three, and from three of the other trawlers, a salvage crew of ten men was made up, and put on board the *Wilhelm Tell*, making, with her carpenter and four of her crew, a total of fifteen hands.

About 2 P.M. a screw steamer hove in sight, and bearing down upon the *Wilhelm Tell*, offered to take her in tow; but the trawlers, regarding themselves as in possession of an abandoned vessel which they could themselves manage, refused her assistance, and shortly after the remainder of the crew of the *Wilhelm Tell*, except the carpenter, were taken to Hull by one of the trawlers.

The men from the trawlers on board the *Wilhelm Tell*, under the direction of the carpenter, now cleared away the wreckage,

1892

THE WILHELM TELL.

and, in the forenoon of the 14th, towage was recommenced; but by 7 P.M. the wind and sea having increased all the trawlers broke adrift, the windlass of the *Irrawaddy* being torn out, and her towage hook broken. The port anchor of the *Wilhelm Tell* was then let go, and was not hove up until the afternoon of the 15th, when, the weather having again moderated, five of the trawlers made fast; but by the morning of the 16th the wind had freshened, and all of them broke adrift. The anchor was again let go, and in the afternoon, the wind having shifted and fallen, the anchor was hove up, and an attempt made to make fast; but the vessel drifted until 1 A.M. on the 17th, when, the wind having died away, three, and afterwards two more, of the trawlers recommenced towage until about 10 A.M., when one of the trawlers got her hawser round the propeller of the *Irrawaddy*, and that vessel fell across the bows of the *Wilhelm Tell*, but was saved from collision by one of the other trawlers.

By this time all but one of the trawlers had broken adrift; but the *Wilhelm Tell* was now in a position of comparative safety at the mouth of the Humber; and the *Irrawaddy*, being short-handed, two of her crew being on board the *Wilhelm Tell*, and two others, the master and boatswain, having received personal injuries in the course of the service—the master having the end of his finger taken off, and the boatswain having his left leg broken in two places—the *Irrawaddy* left, and reached Hull on the evening of December 17.

Three of the remaining trawlers then towed the vessel into Grimsby Roads, and about 6.30 p.m. the *Wilhelm Tell* was taken in tow by tugs and brought into Grimsby Dock, her value at that time being agreed at 20,000*l.*

In consequence of the injury sustained by the master of the *Irrawaddy*, he was under medical treatment and unable to follow his occupation for a month, and the boatswain was unfit for work for a period of thirteen weeks.

Five actions were brought by the respective owners of the eight trawlers against the owners of the *Wilhelm Tell*. These actions were, for the purposes of the trial, consolidated, and on February 27, 1892, and following days, were heard by Jeune, J., assisted by two of the Elder Brethren of the Trinity House.

1892

THE WILHELM TELL.

On March 2 judgment was delivered; and on the general question as to the nature of the services rendered, the learned judge said that the master and crew of the *Wilhelm Tell* had become completely demoralised, and that they, with the exception of the carpenter, abandoned their ship thinking that their lives were in peril, but that the danger to their lives was more imaginary than real. As regards the refusal of the trawlers to accept the services of the steamer, he held that "the salvors ought not to have any deduction made from their award, because in the exercise of their judgment they thought it right to decline the services of the steamer," and after stating that the Trinity Masters agreed with him in "thinking that a high value ought to be placed on the energy, courage, and skill which these fishermen shewed under the circumstances," and after commenting on the danger of the boat service, the danger of collision, the danger and fatigue incurred by the men from the trawlers working as a salvage crew on board the *Wilhelm Tell*, and reckoning that each trawler lost about a week's fishing, the learned judge made a total award of 7550*l*., with costs.

In respect of the services of the *Irrawaddy*, and as to the proportion of the above amount to fall to her owners, master, and crew, the learned judge said: "She came up on the 13th and remained nearly to the end, and was a vessel of considerable value. She contributed two hands to the salvage crew, and during the towing did at least her full share, if not more, for she seems to have been in a position of imminent danger, from which she was only rescued by the skill of her comrades. She was in the thick of the work, and had two of her men injured, one having his leg broken, and another injuring his hand. I shall award to the *Irrawaddy* 1000*l*."

The articles of agreement, under which the applicants were serving on board the *Irrawaddy*, were drawn in the form sanctioned by the Board of Trade under the Merchant Shipping (Fishing Boats) Act, 1883 (46 & 47 Vict. c. 41); they were for a period of six months, subject to twelve hours' notice, and by them the master was to receive as wages $1\frac{3}{8}$ per cent. of the net profits of the fishing, the mate 1 per cent. of the profits, and the boatswain received 22*s*. per week.

1892

THE WILHELM TELL.

As regards salvage, under s. 13 (1) of the above act there was a provision that "every member of the crew, including apprentices, shall be regarded as entitled to participate in any sum or sums of money arising from any salvage or salvage services performed for any ship in distress or otherwise, in the proportion set forth opposite to their respective names in this agreement."

In accordance with this clause the master was to have 10 per cent., the mate 7 per cent., and the boatswain 3 per cent. of any salvage award.

In dealing with the award in question, the owners of the *Irrawaddy* deducted 93*l.* 1*s.* 10*d.* as proportion of costs, and 89*l.* 10*s.* 10*d.* for repairs, thereby reducing the sum awarded to 817*l.* 7*s.* 4*d.*, and they offered the master 81*l.* 14*s.* 9*d.*, and the mate 57*l.* 4*s.* 3*d.*, being 10 and 7 per cent. respectively on this balance. In the case of the boatswain they claimed to deduct the further sum of 64*l.* 17*s.* for loss of fishing, 60*l.* loss of time while undergoing repairs, and 16*l.* 10*s.* cost of fuel, bringing the sum down to 676*l.* 0*s.* 4*d.*, on which they offered him 20*l.* 5*s.* 7*d.*, being 3 per cent. on that reduced balance.

J. P. Aspinall, in support of the motion, on behalf of the master, mate, and boatswain of the *Irrawaddy*. The stipulations in the articles of agreement, so far as they relate to salvage, are, under s. 182 (2) of the Merchant Shipping Act, 1854, altogether void, and the provisions of s. 18 (3) of the Merchant Shipping

(1) The Merchant Shipping (Fishing Boats) Act, 1883 (46 & 47 Vict. c. 41), s. 13: "The skipper of every fishing boat shall enter into an agreement with every seaman . . . . whom he carries to sea from any port in the United Kingdom as one of his crew and every such agreement shall be in a form sanctioned by the Board of Trade . . . . and shall contain the following particulars . . . . (5) the remuneration which each seaman is to receive, whether in wages, or by a share in the catch, or in both ways . . . . And every such agreement shall be so framed as to admit of stipulations, to be adopted at the will of the skipper and seaman in each case, as to advance and allotment of wages, and may contain any other stipulations which are not contrary to law."

(2) 17 & 18 Vict. c. 104, s. 182: ". . . Every stipulation by which any seaman consents to abandon . . . any right which he may have or obtain in the nature of salvage, shall be wholly inoperative."

(3) 25 & 26 Vict. c. 63, s. 18: "It is hereby declared that the 182nd section of the principal Act does not apply to the case of any stipulation made by the seamen belonging to any ship, which, according to the terms of the agreement, is to be employed on salvage

Act Amendment Act, 1862, do not affect the matter, as, though the latter section in part repeals s. 182 of the earlier Act, it is only in respect of the stipulations in the case of crews engaged with a view to rendering salvage services, and not where, as here, the primary occupation of the men is fishing, and permanent employment is not contemplated, but power given to the owners to abruptly terminate the engagement. Again, as by s. 233 (1) of the Merchant Shipping Act, 1854, no assignment of salvage made prior to the accruing thereof will bind, and no authority to receive such salvage is irrevocable, the applicants are not bound by the terms of their agreement, which would, in effect, assign a portion of their salvage to the owners before it accrued. The Court is therefore free to apportion, as to it shall seem just, the actual sum awarded, less unrecovered costs, viz., 906*l.* 18*s.* 2*d.*, without any deduction in respect of the items claimed by the owners, which, if allowed, would give the owners these items twice over, as, in assessing the original award, the Court took into account any damage sustained by the *Irrawaddy* in the performance of the salvage services.

It is submitted that, in view of the exceptional nature of the services rendered to the *Wilhelm Tell*, the Court will not regard as equitable an arrangement by which the owners of the *Irrawaddy* would receive about two-thirds of the total amount. The success of the salvage operations was due, according to Jeune, J., and in the opinion of the Trinity Masters who advised him, to the energy, courage, and skill displayed by these fishermen, and in addition the master and boatswain of the *Irrawaddy* sustained such severe personal injuries as would render the amount proposed to be distributed to them under the agreement altogether inadequate. (2) [On the question of the agreement being

service, with respect to the remuneration to be paid to them for salvage services to be rendered by such ship to any other ship or ships."

(1) 17 & 18 Vict. c. 104, s. 233: ". . . no assignment . . . of salvage made prior to the accruing thereof shall bind the party making the same, and no power of attorney or authority for the receipt of any such . . . . salvage shall be irrevocable."

(2) As regards any medical expenses to which the master and boatswain had been put in consequence of their injuries, and as to any loss in respect of wages, information was not forthcoming at the hearing, but was subsequently furnished to the learned judge, who dealt with these points in his judgment.

1892

THE WILHELM TELL.

inequitable, the following cases were cited, and are discussed in the judgment: *The Enchantress* (1); *The Pride of Canada* (2); *The Louisa* (3); *The Rosario* (4); *The Ganges.* (5)]

Butler Aspinall, for the owners of the *Irrawaddy.* It is submitted that s. 18 of the Merchant Shipping Act Amendment Act, 1862, applies, as there is nothing in that section which limits its operation to cases where the seamen are to be solely engaged in salvage operations. It is well known that these trawlers from their steam power and handiness are able, when occasion requires, to act as tugs to vessels in distress, and it is contemplated by all parties when the voyage commences that there is a probability of their being so employed and earning a salvage award. It is further submitted that the Court will hold the stipulations as to salvage in the agreement to be equitable and binding, because though, in some cases, they may tend to benefit the owner, in other cases, where the services performed by the crew apart from the vessel are light, they would tend to benefit the seamen, and disputes and expense are avoided if the hands employed in a trawler enter into an engagement by which they take the rough with the smooth. It is also an important consideration that the agreement is in the form sanctioned by the Board of Trade under the Fishing Boats Act of 1883. That statute clearly contemplates stipulations being entered into with regard to salvage, and such stipulations do not contravene s. 182 of the Merchant Shipping Act of 1854 because there is no consent to abandon any right to salvage, but only an agreement by which the seamen acquire a right to a certain percentage whether the salvage received by the owners is more or less. To set such an agreement aside in a particular case because some individuals may feel themselves aggrieved would be to introduce the uncertainty which it is the object of the stipulations to prevent.

It is also submitted that unless the owners of the *Irrawaddy* are allowed under the agreement to make the deductions claimed, the master and mate will get more than they are entitled to, and unless the further deductions in the case of the boatswain

(1) Lush. 93.
(2) Br. & L. 208.
(3) 2 Wm. Rob. 22.
(4) 2 P. D. 41.
(5) Law Rep. 2 A. & E. 370.

1892

THE WILHELM TELL.

are allowed he, as the recipient of weekly wages, will gain an advantage over those paid on the profit system. [On the question of the allowance to the owners for damage and loss of profit, the remarks of Lindley, L.J., in *The City of Chester* (1), were referred to.]

Cur. adv. vult.

July 26. GORELL BARNES, J. In this case the master, mate, and boatswain of the *Irrawaddy* ask to have the sum of 1000*l.*, less unrecovered costs, apportioned between them and the other parties interested, and for an order that the applicants are not bound by the articles of the *Irrawaddy* to receive only the proportions of salvage set out therein against their respective names.

This sum of 1000*l.* had been awarded to the owners, master, and crew of the steam trawler *Irrawaddy*, in a suit brought by them against the sailing vessel *Wilhelm Tell* for salvage services rendered in the North Sea to the latter vessel in December, 1891, whereby the *Wilhelm Tell* was, with other assistance, taken into the Humber.

In rendering these services the master and boatswain of the *Irrawaddy* were both injured while on board their own vessel. The master received an injury to one of his fingers in consequence of which he was ill for a month, and during that time he received no pay, but incurred no medical expenses. The boatswain had his left leg broken, and in consequence was laid up for thirteen weeks. During this time he received no wages; but, as he was treated in the Hull Infirmary, he also incurred no medical expenses. When he recovered he was taken on by the owners of the *Irrawaddy* as a deck hand. These particulars were furnished to me after the hearing of the case.

The *Irrawaddy* was for some time under repair owing to the damage received by her in rendering the said services. Admissions were put in before me, from which it appeared that at the time aforesaid the master, mate, and boatswain were respectively serving under articles of agreement of which the following is an extract: "And it is also agreed that every member of the crew, including apprentices, shall be regarded as entitled to participate

(1) 9 P. D. 182, at p. 204.

1892

THE WILHELM TELL.

Gorell Barnes, J.

in any sum or sums of money, received for any salvage services performed for any ship in distress or otherwise, in the proportion set forth opposite to their respective names in this agreement." Then follows a memorandum, from which it appears that the captain (Minns) was engaged on December 7, 1891, at a rate of wages which was based on a share of the fishing profits of $1\frac{3}{8}$ per cent., and a share of salvage of 10 per cent. The mate, engaged at the same time, was to have 1 per cent. of the profits and 7 per cent. of salvage. The boatswain, engaged on November 4, 1891, was to have 22*s.* a week and 3 per cent. of salvage.

It was contended by Mr. Aspinall, for the applicants, that this agreement was not binding upon them, and that they were entitled to have such an apportionment as the Court might deem just under the circumstances, without regard to the agreement. He relied upon s. 182 of the Merchant Shipping Act of 1854, and the following cases, namely, *The Louisa* (1); *The Enchantress* (2); *The Pride of Canada* (3); *The Ganges* (4); and *The Rosario.* (5)

Mr. Butler Aspinall, for the owners, contended, on the other hand, that the agreement was binding upon the parties, on the grounds, first, that the 18th section of the Merchant Shipping Act Amendment Act of 1862 applied to this case; and, secondly, that the 182nd section of the Act of 1854 did not prevent the parties from entering into an equitable agreement for the apportionment of salvage, and that the agreement in the present case was equitable.

Sect. 182 of the Act of 1854 provides, inter alia, that "every stipulation by which any seaman consents to abandon . . . . any right which he may have or obtain in the nature of salvage, shall be wholly inoperative," and the 18th section of the Act of 1862 declares that the said 182nd section is "not to apply to the case of any stipulation made by the seamen belonging to any ship, which, according to the terms of the agreement, is to be employed on salvage service, with respect to the remuneration to

(1) 2 Wm. Rob. 22.
(2) Lush. 93.
(3) Br. & L. 208.
(4) Law Rep. 2 A. & E. 370.
(5) 2 P. D. 41.

be paid to them for salvage services to be rendered by such ship to any other ship or ships."

I do not think the point was referred to in argument; but it is to be noticed that these sections apply only to seamen, and not to masters, for the term "seamen" does not include masters: see the interpretation clauses (s. 2) of the Act of 1854. They do not, therefore, appear to affect the master in the present case.

As to the point raised on the 18th section, I am of opinion that the *Irrawaddy* was not a ship which, according to the terms of the agreement, was to be employed on salvage service within the meaning of that section. She was, in fact, to be employed, according to the terms of the agreement, in trawling in the North Sea, and the clause as to salvage was only inserted in order to deal with the case of an apportionment of any salvage which she might have the good fortune to earn.

The contentions on the part of the applicants give rise to more difficulty; but in my opinion the result of the cases above referred to—and also the cases of *The Afrika* (1), and of *The Beulah* (2)—is to shew that the 182nd section of the Act of 1854 does not prevent seamen from entering into an equitable agreement for the apportionment of salvage, though it prohibits stipulations by which they abandon their rights to salvage, and that the Court will uphold an agreement with seamen for the apportionment of salvage, if it is not inequitable.

In *The Louisa* (3), Dr. Lushington readjusted the agreed apportionment, apparently on the ground that it gave the owners more than the Court ever, at that time, decreed to them, and it would seem as if he must have considered that the scale of apportionment agreed to was inequitable.

In *The Enchantress* (4), the same learned judge stated that he would decree an equitable apportionment, unless barred by an equitable agreement or an equitable tender; and he said (5) that "local and customary agreements, if equitable, such as that where there is a lifeboat company, those who stay shall be rewarded as those who go, the Court will favourably consider."

(1) 5 P. D. 192.
(2) 2 Notes of Cases, 61.
(3) 2 Wm. Rob. 22.
(4) Lush. 93.
(5) At p. 97.

1892

THE WILHELM TELL.

Gorell Barnes, J.

The Pride of Canada (1) was only a case in which the owners failed to bring the case within the 18th section of the Act of 1862; but Dr. Lushington, according to the report in the Maritime Law Cases, stated that, even before the Act of 1854, no seaman could enter into a stipulation of an inequitable nature.

In *The Ganges* (2), Sir Robert Phillimore held that an agreement in that case to pay certain wages, and a fixed rate of poundage on towage and salvage money earned by a tug, was not inequitable, although the sum allowed to the plaintiff, a temporary master, would be very inadequate remuneration according to the general principles upon which salvage is distributed.

In *The Afrika* (3), Sir Robert Phillimore adopts the language in *The Enchantress* (4) which I have quoted above. He says (5): "On this point I think it necessary to refer to the law laid down in *The Enchantress* (4), and I take the law as laid down in that case to be perfectly clear. In that case Dr. Lushington said: 'I conceive a duty is hereby imposed upon me to decree, upon application made, what in my judgment is an equitable apportionment of salvage, unless I am barred by one of two circumstances—either an equitable agreement between the parties, or an equitable tender.'"

In *The Beulah* (6), Dr. Lushington said (7) that he would make an exception to any arrangement made with seamen where there had been any extraordinary personal risk and labour to the seamen. If, however, an equitable agreement had been entered into, I do not myself understand on what principle such an exception should be allowed, unless perhaps it might be considered, in exceptional cases, that the services of the men were beyond the scope of what was contemplated by the agreement at the time it was entered into.

The policy of the law is to protect seamen from improvident arrangements, and to encourage their exertions to save life and property. An agreement which secures these objects appears to

(1) Br. & L. 208; more fully reported in 1 Mar. L. C. 406.
(2) Law Rep. 2 A. & E. 370.
(3) 5 P. D. 192.
(4) Lush. 93.
(5) 5 P. D. at p. 194.
(6) 2 Notes of Cases, 61
(7) At p. 64.

me to be unobjectionable. They are secured in the fishing trade in the way I am about to point out. I should observe that no distinction is drawn in the cases between masters and seamen, though, as I have pointed out, s. 182 and s. 18 do not apply to masters. In all these cases there was no special legislation affecting the parties besides the Merchant Shipping Acts; but, at the time of the argument in this case, the form of articles used for the *Irrawaddy* was produced, and it then appeared that it was in the form issued by the Board of Trade in pursuance of the Merchant Shipping (Fishing Boats) Act, 1883 (46 & 47 Vict. c. 41). Sect. 13 of the Act provides that "The skipper of every fishing boat shall enter into an agreement with every seaman (not being a boy under such an agreement as is by this Act required) whom he carries to sea from any port in the United Kingdom as one of his crew . . . and every such agreement shall be so framed as to admit of stipulations, to be adopted at the will of the skipper and seaman in each case, as to advance and allotment of wages, and may contain any other stipulations which are not contrary to law."

The *Irrawaddy* was a steam trawler, to which the Act applied, and her owners were compelled to use this form of articles which had been sanctioned by the Board of Trade. The articles were for trawling in the North Sea, and contained as part of the printed form the clause above mentioned, as to the apportionment of salvage, and a column for the insertion of the share of salvage.

For such a vessel engaged in such a trade under such articles it seems very reasonable to have a provision for apportioning salvage on a fair basis, taking the rough with the smooth. This form must now be in use amongst a very large number of vessels, and if a fair percentage of the salvage is allotted to each man on the articles, the men have the advantage in easy towage cases, which are not infrequent, though their duties may be more arduous in rendering more difficult services.

I am informed that the present agreement gives the owners about two-thirds, and the master and crew one-third, of any salvage award.

In my opinion the agreement as to the apportionment of the

1892

THE WILHELM TELL.

Gorell Barnes, J.

salvage contained in these articles ought to be supported on the ground that it is entered into in the form and manner which I have described, and is equitable, and that the stipulation as to apportionment is not contrary to law. Moreover, in the present case, I do not think the applicants ran any greater risk than any of the rest of the crew, though they were more unfortunate in the accidents they met with. The Court would hardly in such a case as this, apart from the agreement, give the owners of a steamer, rendering useful towage services upon salvage terms, less than two-thirds of the sum awarded.

A further point was raised by the owners, that, in arriving at the nett sum to be apportioned, they were entitled to deduct certain sums, set out in the admissions, for repairs, and, as against the boatswain, certain further sums for loss of profits, time, &c.; but, in my opinion, the owners are not entitled to make those deductions. The agreement is for a certain share of the salvage, and, in my judgment, that means the sum awarded, less, as is agreed, the unrecovered costs in obtaining the award.

The agreement is binding, and the owners in a particular case may have to bear some disadvantages, just as some members of the crew do.

I therefore apportion the sum of 1000*l.*, less unrecovered costs, in the proportions mentioned in the articles of agreement, and, as neither party has succeeded entirely in their contentions, I leave each party to pay their own costs.

Solicitors for the master, mate, and boatswain of the *Irrawaddy*: *Stokes, Saunders, & Stokes.*

Solicitor for the owners of the *Irrawaddy*: *F. W. Hill.*

T. L. M.

THE JAEDEREN.

1892
July 14.

Admiralty—Charterparty—Demurrage—"Steamer to be discharged as fast as she can deliver"—Custom for Dock Company to discharge Cargo.

By charterparty between the plaintiffs, shipowners, and the defendants, charterers, it was agreed that the plaintiffs' steamer should proceed with the defendants' cargo to the Albert, Stanley, or Wapping Dock, Liverpool, as ordered, "Steamer to be discharged as fast as she can deliver."

The vessel was ordered to the Albert Dock. She arrived there at 6 A.M. on a Monday, and the master handed to the dock company a copy of the manifest of the cargo, together with a request and authority to discharge the cargo, and deliver it to the order of the consignees.

As the berths around the dock were occupied, the vessel was moored, under the direction of the dock officials, alongside another steamer, and there remained until she could be hauled into a quay berth at midday on Thursday.

It was customary at that dock for the whole of the discharge to be done by the dock company's servants at the quay; but owing to the quay being crowded with other cargo, the discharge was not commenced until Saturday, and (the intermediate days being Sunday and Bank Holiday) was not resumed until the following Tuesday. It was completed by 3 P.M. on the Wednesday, being the tenth day from the arrival of the vessel in the dock.

The discharge, under ordinary circumstances, would occupy two days.

In an action for demurrage:—

Held, that the defendants were not liable, as the whole operation of the discharge was, by the custom of the dock, carried out by the dock company's servants at the quay, and the plaintiffs had failed to make out any breach of the contract to discharge as fast as the ship could deliver.

ACTION (transferred from the City of London Court) for 112*l.*, eight days' demurrage at 14*l.* per day.

The plaintiffs were Walsh Brothers & Co., chartered owners of the steamship *Jaederen*; the defendants were J. V. Drake & Co., charterers of the vessel.

The material facts were that—

By charterparty, dated March 10, 1890, it was agreed between the plaintiffs and the defendants that the *Jaederen* should load at Dunkirk, for the defendants, a cargo of about 530 tons of sugar in bags, and therewith "proceed to Liverpool, Albert, Stanley, or Wapping Dock, as may be ordered by the consignees, or so near thereunto as she may safely get, and there deliver the same on being paid" the agreed freight. Three working days to be allowed the defendants (if the ship not sooner despatched)

1892

THE JAEDEREN.

"for loading." The two next words in the printed form "and discharging" were struck out, and the following inserted in writing: "Steamer to be discharged as fast as she can deliver."

Then followed a provision as to demurrage, viz.: "If required ten days on demurrage over and above the said laying days at fourteen pounds per day, or in proportion per hour."

Under this charter the *Jaederen* arrived in the Mersey at 3 P.M. on Saturday, March 29, with orders to discharge in the Albert Dock. After waiting two hours for the tide, she went into the Salthouse Dock at 5.30 P.M., and remained there all Sunday. On Monday, March 31, at 6 A.M., she hauled into the Albert Dock, and the master delivered to the dock company, on a printed form, a copy of the manifest of the cargo with the following foot-note signed by him: "I declare the above to be a true copy of the manifest of the cargo of the ship herein named, and hereby request, and authorize, the Mersey Docks and Harbour Board to discharge the said cargo, and deliver the same to the order of Messrs. Walsh Brothers, the consignees of the vessel."

As the berths around the dock were occupied, the *Jaederen* was moored, under the direction of the dock officials, alongside another steamer, and remained there that day and Tuesday and Wednesday. On Thursday, April 3, the inside steamer having completed her discharge, she hauled out, and the *Jaederen*, about midday, hauled into the quay; but the quay was so blocked with the cargo of the other steamer that the work of discharge was not proceeded with that day. The next day was Good Friday; but at 8 A.M. on Saturday, April 5, the discharging began and continued till 4 P.M. On the two next days, Easter Sunday and Monday (Bank Holiday) no work was done; but on Tuesday, April 8, work was carried on from 8 A.M. to 5.30 P.M., and on Wednesday, the 9th, from 8 A.M. to 3 P.M., when the discharge of the 5181 bags of sugar was completed.

This was the tenth day from the time the vessel arrived in the dock, and as, owing to the quay being blocked by cargo from the other steamer, only one gang of men could be employed, the actual discharge effected on the Saturday, Tuesday, and Wednesday occupied 24½ hours.

The Albert is a "closed" dock, work being only done there by the dock company's servants or by the crew of the vessel, and it appeared from the evidence that, in practice, the whole operation of the discharge is carried out by the dock company's servants, who, in consideration of 9*d.* per ton paid to the dock company by the shipowner, hoist the cargo in slings out of the ship's hold with shore gear, place it on trollies running on stages to the edge of the hatch, wheel it on shore, and tip it off on to the edge of the quay. The dock company then, acting in the capacity of agents of the receivers of the cargo, convey it from the edge of the quay, and store it, or otherwise deal with it as directed. There was no practice in that dock to discharge sugar into lighters, and two days or twenty hours would, under ordinary circumstances, be a reasonable time to discharge, at a quay berth, such a steamer as the *Jaederen.*

The breach of contract alleged by the plaintiffs in their statement of claim was that "the said steamer was not discharged as fast as she could deliver," and the particulars claimed demurrage for eight days from April 1, 3 P.M., to April 9, 3 P.M.

Substantially the defence set up was that: "If there was any delay in connection with the discharge of the said vessel, the same was due, not to the defendants, but to the Liverpool Dock Company, which, according to the custom of the port of Liverpool, does the work of discharging for both shipowners and charterers, and for whose delay it was an implied term in the said charterparty that the defendants should not be responsible."

By their reply the plaintiffs said that: "As to the custom alleged . . . . the plaintiffs . . . . say that it is wholly irrelevant and immaterial by reason of the failure on the part of the defendants to secure or provide a discharging berth for the said steamship (as the defendants were bound to do under the said charterparty) on her arrival in the said Albert Dock."

Pyke, Q.C., and *H. Holman,* for the plaintiffs. The *Jaederen* must be taken to have "arrived" when she came into the Albert Dock on Monday, March 31, for she was at the stipulated place of discharge, and the cargo ought to have been out in two days. For the subsequent detention of the ship the defendants are

1892

THE JAEDEREN.

liable under their contract. This has been so held, notwithstanding that the detention was caused by the crowded state of the dock: *Randall* v. *Lynch.* (1) In that case Lord Ellenborough said (2) that the detention of the ship arising from the inability of the London Dock Company to discharge her was imputable to the freighter, as he was responsible for all the various vicissitudes which might prevent him from restoring the vessel to her owner at the end of the stipulated time.

[GORELL BARNES, J. In *Good* v. *Isaacs* (3), the Court of Appeal held that the claim for demurrage would not lie where the ship on arrival was unable to discharge immediately, as the harbour authorities, owing to the crowded state of the port, refused to allow her to moor at the usual berth for unloading fruit.]

That case is distinguishable on two grounds, first, that, by the terms of the charterparty, the vessel was to be discharged at usual fruit berth; but in this case the vessel had "arrived" when she was in the Albert Dock; secondly, the harbour authorities refused to allow that vessel to moor at the usual berth; but it is submitted that the obligation in this case to have a clear berth falls upon the charterers, as, even where the words are "load in the usual and customary manner," it has been held that the lay-days commenced from the time of getting into dock: *Tapscott* v. *Balfour* (4), Bovill, C.J., in that case saying that the effect of the charterparty was that the vessel should proceed direct to the Wellington Dock, and there load in the usual and customary manner; the words "customary manner" referring only to the mode of loading, and not to the place to which the shipowner undertakes that the ship shall proceed, so that any loss arising from the state of the dock must fall on the charterer, and not on the shipowner.

The Master of the Rolls, in *Tharsis Sulphur and Copper Co.* v. *Morel* (5), refers to that case as shewing that where a particular dock has to be named by the charterer, the voyage terminates at that dock.

In *Pyman* v. *Dreyfus* (6), where delay occurred in getting the

(1) 2 Camp. 352.
(2) At p. 355.
(3) [1892] 2 Q. B. 555.
(4) Law Rep. 8 C. P. 46.
(5) [1891] 2 Q. B. 647, at p. 650.
(6) 24 Q. B. D. 152.

vessel alongside a quay berth in the inner harbour at Odessa, it was held that the lay-days were to be computed from the time of the arrival of the vessel in the outer harbour, the contract being to proceed to "Odessa, or so near thereunto as she might safely get."

Kennedy, Q.C., and *Joseph Walton*, for the defendants. The cases cited on behalf of the plaintiffs are not relevant, because they, either directly or by implication, fix a time within which the discharge is to take place. No doubt, if the charterer has agreed to discharge the ship within a fixed period of time that is an absolute and unconditional engagement, for the non-performance of which the charterer is answerable, whatever may be the nature of the impediments which prevent him from performing it; but here the "steamer is to be discharged as fast as she can deliver," and, until the vessel is in a position to deliver, the charterers cannot discharge her. In the ordinary way the shipowner brings the cargo to the rail, and the merchant takes it away; but this joint operation was performed by the dock company, who had the whole control of the discharge, and the custom of the port becomes, therefore, an implied term of the contract, and makes the stipulation equivalent to "the cargo is to be discharged with all despatch according to the custom of the port." These were the words of the charter in *Postlethwaite* v. *Freeland* (1), and Lord Blackburn says (2) that "the express reference to the custom of the port of discharge is no more than would be implied."

The principle laid down in that case was held to govern the facts in *Wyllie* v. *Harrison* (3), where the charterparty contained the words, cargo to be discharged "as fast as steamer can deliver after being berthed as customary," Lord Young saying (4): "The expression, 'as customary,' is added here, but I think its occurrence is superfluous, and does not affect the meaning of the contract. Unless something to the contrary were shewn, it would be implied that delivery was to be by the custom of the port, especially when it could not be taken otherwise, as was the case here." . . . "I think the contract was to deliver and receive,

(1) 5 App. Cas. 599.
(2) At p. 613.
(3) 23 Sc. L. Rep. 62.
(4) At p. 65.

1892

THE JAEDEREN.

as alone delivery could be given and received at the place where it was contracted to be given and received." The defendants, therefore, say that, assuming the *Jaederen* had "arrived," still she was not ready and able to deliver until she was in a quay berth, and as the dock company acted as the agents of both parties, there was a joint inability to effect the discharge faster than circumstances permitted, so that neither party could sue the other for delay arising from a cause over which he had no control: *Ford* v. *Cotesworth*. (1) Again, where, by the custom of the port, the dock company undertook the work of discharging cargo, and the effect of the charterparty was to provide that the cargo should be discharged with all reasonable despatch, the Court of Appeal held that the charterer was not liable for delay arising from a strike of dock labourers: *Castlegate* v. *Dempsey* (2), Lord Esher, M.R., in the course of the argument in that case, observing (3): "The dock company undertook to do the share of the work of discharging the cargo that would ordinarily fall on the shipowners, as well as that which would ordinarily fall on the charterers. The strike prevented that being done which would ordinarily be a condition precedent to the charterers' obligation."

The plaintiffs allege that it was the duty of the defendants to find a berth. It is contended that no such obligation was laid upon the defendants, for there are no such words here as "to such ready quay berth as ordered by charterers," which were construed in *Harris* v. *Jacobs* (4) to cast that duty upon the charterers. In *Hick* v. *Rodocanachi* (5), where a strike of the dock labourers delayed the unloading for a month, the defendants were held not liable, as there was no express limit of time imposed, and therefore they were entitled to a reasonable time with reference to the circumstances. In *Cunningham* v. *Dunn* (6) it was held that, where through the act of a superior power the parties were unable to perform their respective duties as to loading and receiving under the contract, no liability was incurred; and it is submitted that, on the facts of this case, the

(1) Law Rep. 5 Q. B. 544.
(2) [1892] 1 Q. B. 854.
(3) At p. 857.
(4) 15 Q. B. D. 247.
(5) [1891] 2 Q. B. 626.
(6) 3 C. P. D. 443.

ship was discharged as fast as she could deliver, taking into account the customary mode of effecting the discharge at that dock.

Pyke, Q.C., in reply. As the defendants admit that the ship had "arrived," and, therefore, all that the ship had to do was at an end, the charterers were bound to find her a safe berth in order to fulfil their contract to discharge her as fast as she could deliver. In the American case of *Bjorkquist* v. *Certain Steel Rail Crop Ends* (1), it was held that under a charterparty providing that the cargo should be loaded "and discharged with all quick despatch, as fast as the captain can receive and deliver," demurrage was recoverable for delay caused by the failure of the vessel to obtain a berth owing to the crowded condition of the docks, even though the charterers used all efforts to obtain a berth promptly, and used all despatch in unloading after obtaining it. Morris, J., who tried the case, says (2): "The charterers expressly agreed that the vessel should have quick despatch in discharging, and that they would receive the cargo as fast as the master could deliver it. They took upon themselves the risk of being able without delay to provide a suitable berth, and they cannot excuse themselves by shewing that they have used reasonable diligence, and have discharged the vessel within a reasonable time, considering the crowded condition of the port. They made a definite and express contract, and they must shew that they have complied with it." It is submitted that that case supports the plaintiff's contention that the defendants are liable for the demurrage claimed.

GORELL BARNES, J. [after detailing the terms of the charterparty already set out, and the facts as to the time occupied in discharging the vessel, also already stated, continued:—] It appears to me an important point in this case to consider what is the course of discharge adopted in accordance with the custom of the port of Liverpool at this dock. It seems that the master on entering the dock delivers to the Mersey Docks and Harbour Board, on a printed form, a manifest of his ship's cargo, and he signs at the end of this document a declaration in which he

(1) 5 Hughes' Rep. 194. (2) At p. 195.

1892

THE JAEDEREN.

Gorell Barnes, J.

declares it to be a true copy of the manifest of the said ship, and thereby requests and authorizes the Mersey Docks and Harbour Board to discharge the cargo and deliver the same to the order of Messrs. Walsh Brothers & Co., the consignees of the vessel.

The discharge in pursuance of that request took place in the way with which the cases which have been reported, and the ordinary course of business, make one familiar; that is to say, the dock company's servants performed the whole operation of discharging the vessel and placing the goods in the warehouse. They act in two capacities, partly for the shipowners and partly for the consignees or charterers. So far as they represent the shipowners, or do work which is to be done by the shipowners, they take the cargo from the ship, hoist it up out of the hold, place it on trollies on a stage or stages which run to the edge of the hatch, and then wheel it on shore and tip it off on to the edge of the quay. For these services, as I understand, the shipowners pay the dock company a tonnage rate of 9*d.* per ton. From that point the dock company appear to act in the capacity of agents of the receiver of the cargo, convey it from the edge of the quay, and store it or deal with it in any other way in which they are directed.

The breach that is alleged in this case is stated in the third paragraph of the statement of claim, namely, that "the said steamer was ordered by the consignees to the Albert Dock; but the said steamer was not discharged as fast as she could deliver, and was detained for a long time by the defendants." The defence substantially, except so far as it is matter of formal traverse, and, at any rate, when dealt with by the defendants' counsel, admits practically the facts of the case, and no evidence was called for the defendants except the putting in, in the course of the plaintiffs' case, of the request signed by the master to the dock board. But the defence further suggests that the work is done according to the custom of the port by the dock company, who do the work of discharging for both shipowners and charterers, and that if it result in delay beyond the time in which the vessel might have been discharged, assuming the dock free and that there is no obstruction, this is a delay for which the defendants ought not to be held responsible. In effect what they say is

this, that the vessel was discharged as fast as she could deliver, having regard to the customary way in which that discharge has to take place. There is no reference whatever in the charterparty to the custom of the port; but I do not think that the absence of reference to the custom of the port is of any very great importance; because it is obvious that the discharge of a vessel under such a charterparty as this at such a dock must take place in accordance with that which is the usual way of performing that operation, and as Lord Blackburn, in *Postlethwaite* v. *Freeland* (1), in commenting upon the charterparty in that case, says (2): "The only other reference to the discharge of cargo is 'the cargo is to be discharged with all despatch according to the custom of the port.' I do not think that that alters the question, as the express reference to the custom of the port of discharge is no more than would be implied, for I take it that a charterparty in which there are stipulations as to loading or discharging cargo in a port, is always to be considered as made with reference to the custom of the port of loading or discharge as the case may be." In the nature of things it seems to me that it must always be so.

Now, I have described the ordinary and customary mode of discharging at this port, and it appears to me that shipowners, when they enter a dock of this character, and place themselves, as they have done in this case, in the hands of the dock company to carry out the discharge in accordance with what appears to be, upon the evidence, the invariable practice of the port, must in so doing leave these agents to deal with the matter of the discharge in the customary way; and that when the shipowners assert that the vessel has not been discharged as fast as she can deliver, it rests upon them to shew, having regard to the way in which the discharge must be done, that she has not been discharged as fast as she could deliver—in effect, that she could have delivered, under the circumstances in which she was placed, at a greater rate than in fact was the case. As has been said, I think by Mr. Walton, this discharge is a joint operation, and could only be carried out in the way in which the master of the vessel requested that it should be done.

(1) 5 App. Cas. 599. (2) At p. 613.

1892

THE JAEDEREN.

Gorell Barnes, J.

A great many cases have been referred to in the course of this argument. In fact, the number of points that crop up in these charterparty cases seem almost inexhaustible; but in looking through all these cases, no case is found which really governs this at all. Every case which has been cited by Mr. Pyke as applicable to the question of an arrived ship, appears to be a case in which a limited time has been fixed for the purpose of the discharge, and no case has been cited in which the precise language used in this charterparty has been adopted. Therefore, one must construe this charterparty having regard to the principles laid down in the cases referred to, but having regard also to the course of business to be adopted in carrying it out; and the conclusion to which I have come is that the plaintiffs fail to make out a case of a breach by the defendants in not discharging this vessel "as fast as she could deliver." Shortly stated, it really is this. The steamer could not deliver any quicker than she did, and for that reason the defendants, in my judgment, have not committed any breach of contract, and I must therefore pronounce in their favour.

Judgment for defendants.

Solicitors for plaintiffs: *Downing, Holman & Co.*
Solicitors for defendants: *William A. Crump & Son.*

T. L. M.

[DIVISIONAL COURT.]

1892
July 20.

THE HORNET.

Admiralty—Collision—Barge sunk whilst moored in a Dock—Absence of Man in Charge—No presumption of Negligence in Owner of Barge.

Between 6 and 7 o'clock on an October evening, the man in charge of a laden barge left her moored in a dock lighted by the electric light.

Between 7 and 8 P.M., a steam tug, used in shifting craft in the dock, ran into her, and when the man returned at 9 P.M. he found the barge sunk.

In an action of damage by collision, brought, in the City of London Court, by the owners of the barge, against the owners of the tug:—

Held, that, in law, there was no duty on the owner of a barge to have a man on board of her when moored in a dock, and that, on the facts, the tug must be pronounced alone to blame.

On appeal, on the ground (inter alia) that there was contributory negligence on the part of the owners of the barge in leaving her without any one in charge of her, who might have averted the collision, or beached the barge afterwards:—

Held, by the Divisional Court, that the appeal must be dismissed, for the absence of a person on the barge had nothing to do with the collision, and it would have been impracticable to have beached the barge afterwards.

The Scotia (6 Asp. M. L. C. 541), and *The Dunstanborough* (post, p. 363) distinguished.

APPEAL by defendants, the owners of the tug *Hornet*, in an action of damage by collision, from a decree of the judge of the City of London Court, in favour of the plaintiffs, the owners of the barge *Security*, her cargo and freight.

The material facts were shortly that—

On October 27, 1891, the sailing barge *Security*, of about 140 tons, was lying on the east side of the West Tilbury Dock, with her head pointing southerly towards the dock entrance. She was laden with about 135 tons of chalk, and had a freeboard of a few inches amidships, with a draught of about 2 feet forward, and 1 foot 8 inches aft.

According to the plaintiffs' evidence, her head was moored to a ring in the wall of the quay by two ropes, one leading to the bow cleet, the other to the bitt-head, and a stern-rope, attached to the main hawse, was fast to another ring in the quay wall.

Between 3 and 4 P.M. the master, and between 6 and 7 P.M. the mate, of the barge went ashore.

1892

THE HORNET.

According to the evidence of the master and mate of another barge lying near the *Security*, between 7 and 8 P.M., the tug *Hornet*, coming down the dock in a southerly direction, struck with her stem the stern frame of the *Security*.

According to the mate of the *Security*, he found the barge sunk on his return about 9 P.M.

The dock is lighted at night by electric light.

According to the defendants' evidence, the *Security* was seen by the *Hornet* lying, heading about S.E., moored by a head-rope only, with no one on board of her, and the tug passed some twenty feet clear of her, going three to four knots. It was admitted that one of the dumb barges, in tow of the *Hornet*, as she was going up the dock about 6 P.M., touched the *Security*; but it was alleged that to have sunk her in the way suggested by the plaintiffs' witnesses, as she was coming down the dock, was an impossibility, as the draught of the *Hornet* was 6 feet forward and there was a mat fender 10 feet long, 5 feet deep, and 7 or 8 inches thick, covering, to below the water line, the whole stem of the *Hornet*, and expressly provided to enable the tug to push, without damaging them, craft in the process of shifting them in the dock.

On these facts it was submitted that if the *Hornet* was to blame, then that the owners of the barge were also to blame for leaving a barge loaded in a dock without anybody in charge of her, and reliance was placed on *The Scotia*. (1)

The learned judge of the City of London Court gave judgment for the plaintiffs, holding that there was "no duty on people to have men on board a barge in the dock," and that *The Scotia* (1) did not go to the length contended for, as in that case, "if a man had been on board he would have prevented that barge drifting down and resting on the steamer"; but in the present case, the barge "was moored head and stern by direction of the dock master."

On appeal:

Hollams, for the appellants (defendants), the owners of the tug *Hornet*. The appeal is based on two grounds, first that the

(1) 6 Asp. M. L. C. 541.

1892

THE HORNET.

Hornet could not be to blame as the sinking of the barge by her was a physical impossibility owing to the fender covering the tug's stem. Secondly, if the *Hornet* was to blame, then the barge was also to blame as no one was in charge, and on the evidence the barge must have shifted her position, which would have been prevented if some one had been on board.

[THE PRESIDENT. The case of *Davies* v. *Mann* (1) seems inconsistent with that line of argument.]

It is submitted that tending the mooring-rope is a material matter to insure the safety of the barge; and in *The Scotia* (2) the mere fact of the barge having no one in attendance was held to be evidence of negligence, and to be sufficient ground for finding the barge also to blame.

In the case of *The Dunstanborough* (3), where a barge was

(1) 10 M. & W. 546.

(2) 6 Asp. M. L. C. 541.

(3) *The Dunstanborough* was tried by Jeune, J., assisted by two of the Trinity Brethren, on March 15 and 16, 1891. The facts were that: On November 19, 1890, the plaintiffs' dumb barge *Arthur*, with a cargo of rape seed, was lying, head to the ebb tide, moored by a head-rope to the collar of the lower of the Surrey Commercial Dock buoys, and the defendants' steamship *Dunstanborough* was moored, head and stern, to these buoys, head down stream, with her stern close up to the upper buoy, and her head overlapping the lower buoy. In the process of discharging her cargo the *Dunstanborough* rose in the water, and during the absence of the man in charge of the barge, the fluke of her starboard anchor, which was hanging from the hawse-pipe, fouled the starboard side of the *Arthur*, holed her, and, capsizing the barge, threw her cargo into the water.

Bucknill, Q.C., and *J. P. Aspinall*, for the plaintiffs, proved these facts.

Barnes, Q.C., and *F. W. Raikes*, for the defendants, elected to call no witnesses, and submitted that the damage might have been prevented by the exercise by the plaintiffs' servants of ordinary care, and as no one was in charge of the barge at the critical time, there was contributory negligence on the part of her owners. They further submitted that, as neither the steamer nor the barge were being navigated, there was no collision between two ships to which the Admiralty rule as to half damages could be applied, and therefore the plaintiffs were, at common law, altogether precluded from recovering.

JEUNE, J., in giving judgment, held, that it was a case of two vessels coming into collision, in the course of their navigation, as in *The Margaret* (6 P. D. 76) and *The Scotia* (6 Asp. M. L. C. 541), so that the Admiralty rule as to the assessment of damages would apply, and as both parties contributed to the accident, both the steamer and the barge must be held to blame, the steamer for not having her anchor stock awash in accordance with article 20 of the Thames Bye-Laws,

1892

THE HORNET.

capsized by the anchor of a steamer rising under her, the barge was held also to blame as guilty of negligence in having no one on board of her at the time the accident occurred. So here, if there had been a person in charge of the barge, he could have withdrawn her out of danger, or hailed the tug, or otherwise attracted attention, and so averted the mischief, or he might have minimised the damage by beaching the barge.

Pyke, Q.C., and *F. Laing*, for the respondents (plaintiffs)—the owners of the barge *Security*, her cargo, and freight—were not called upon.

THE PRESIDENT (SIR FRANCIS JEUNE). I have no doubt there was considerable contradiction between the witnesses in this case, and it is exactly the sort of contradiction of which a Court hearing the witnesses could best judge, as it would be able to take account of the demeanour of the witnesses as well as of their actual words. I come to the same conclusion as the Court below. There were two witnesses who say positively that they saw the collision take place. It is quite true that there is some discrepancy between them as to the speed of the *Hornet* as she came down the dock; but still it seems impossible that they could be mistaken as to what they saw. The evidence of the witnesses on the other side is open to criticism in respect of similar contradictions, and put at the highest, it is negative evidence, and, further, it is doubtful whether at the time of the collision these witnesses were in a position to see. It is said that the damage could not possibly have taken place in the way in which it is alleged it did

---

1872, and the barge for not avoiding danger which had been obvious for some time.

As to the negligence on the part of the barge the learned judge said: "On the day before the collision the man on the barge had his attention called by a man on another barge to the position of the anchor." . . . "Still more during the hour in which the man on the *Arthur* was away he might have done a great deal to avoid the collision. If he had been there, there were many things which he might have done. There was, in the opinion of the Trinity Masters, nothing to prevent him from veering, and so getting away. Under these circumstances there was negligence attaching to the barge."

Solicitors for plaintiffs: *Keene, Marsland, & Bryden.*

Solicitors for defendants: *Thomas Cooper & Co.*

T. L. M.

because of the fender; but that is open to question, as the witnesses differ as to whether it came down below the water-line. The *Security* was sunk by a blow from some vessel, and no other way has been suggested in which the accident could have occurred; so that, on the whole, we have come to the conclusion that the decision of the Court below must be upheld.

There remains a question which is partly one of law and partly one of fact. It is said that there was no one on board this barge, and that if she had been properly moored her stern would not have come out and so presented an obstacle against which the *Hornet* ran.

Assuming, however, that there was no one there and that the stern did come out, we cannot bring ourselves to think that that raises any case which would make the barge liable as well as the tug, on the ground that there was contributory negligence; for, whichever way it is put, it appears to be clear that the absence of the person on the barge had nothing to do with the collision. There was plenty of light, and the *Hornet* could see perfectly well where the barge was.

In the case of *The Scotia* (1), and in the case of *The Dunstanborough* (2), it is clear that, if a man had been on board he could have prevented the accident altogether; and further, in the case of the *Scotia*, he could have prevented the consequences of it by beaching the barge.

It has been suggested that, in this case also, the barge might have been beached if some one had been in charge of it; but that point was not taken in the Court below; and the Trinity Masters are of opinion that, from the nature of the sides of the dock, such a course would have been impracticable; so that I do not think either of the authorities mentioned in the argument are applicable to the present case. The Trinity Masters also think, and we agree, that there is a broad distinction between leaving a barge in a dock, where there is no tide, and therefore no rise and fall, and leaving it in a tideway where the ropes require tending. It is also to be remarked that, in this case, the barge was left for only two or three hours in the evening. She was not left all

(1) 6 Asp. M. L. C. 541. (2) Ante, p. 363.

1892

THE HORNET.

night. The result is that the decision below will be affirmed and the *Hornet* held alone to blame.

GORELL BARNES, J., concurred.

Appeal dismissed.

Solicitors for appellants, the owners of the tug *Hornet*: *Turner & Hacon.*

Solicitors for respondents, the owners of the barge *Security*, her cargo and freight: *Ingledew, Ince, & Colt.*

T. L. M.

1892

July 28.

THE KATE B. JONES.

Admiralty—Salvage—Services rendered by Agent—Authority to incur Expenses—Principle upon which Award based.

An agent is not precluded from claiming as a salvor; but where the owners of the property in danger have requested him to render assistance, and thereby have given him a right to some remuneration though the operations prove unsuccessful, the assessment of the award, for successful salvage services, will be based upon the principle that the agent did not, like an independent salvor, run the risk of the loss of the entire expenditure if his efforts had proved unsuccessful.

ACTION OF SALVAGE.

The plaintiffs were the Port Said and Suez Coal Company, Limited, owners of the tugs *Fannie* and *Agnes*, and of several lighters; George Royle, manager of the company at Port Said; Arthur John Tweedie, sub-manager; Nicolas Psorulla, marine superintendent; Luciana Fonda, assistant marine superintendent; Joseph Watkins, inspecting engineer; and the masters and crews of the said tugs.

The defendants were the owners of the steamship *Kate B. Jones*, her cargo, and freight.

The facts—so far as material on the question as to the principle upon which the remuneration of an agent rendering salvage services is to be based—were briefly as follows:—

On April 5, 1891, the steel screw steamship *Kate B. Jones*—of 1983 tons gross, and 1285 tons net, register, on a voyage from Bombay to Belfast, with 2800 tons of wheat in 25,200 bags—called at Port Said, and was supplied with bunker coal by the

1892

THE KATE B. JONES.

plaintiff company. The contract for coal, with a firm of coal merchants in London, was for the supply, for a period of one year, of all the coals required for the use of their steamers by the owners of the *Kate B. Jones*; but the plaintiff company, having a depôt at Port Said, fulfilled the contract, paying the firm of coal merchants a commission on the order; and the plaintiffs' manager, George Royle, was named in the contract as the supplier of the coals at Port Said. The plaintiff company also advanced the canal dues to the master; but for this the company received no remuneration, as they advance these dues, pilot dues, and other expenses, for the convenience of shipowners, and rely for their profit upon the sale of the coal.

On April 6, a steamer arrived at Port Said, and reported passing the *Kate B. Jones* stranded, seven miles E.S.E. of Damietta Light, and that she was signalling for assistance. This news the manager of the plaintiff company telegraphed to the owners of the vessel at Cardiff, adding, "Will you authorize me sending assistance, please give definite instructions." The owners replied: "Render immediate assistance; float vessel; wire detailed information respecting vessel's position and local available means of getting vessel off"; and on the 7th they telegraphed: "Is *Kate* holed, what divers procurable; if holed, and no competent divers procurable to close up leak, secure Dardanelles Salvage Company's steamer promptly." To this the plaintiffs' manager replied: "Think ship will be got off if the weather favour us, the communication between ship and shore is uncertain and difficult, will do our best for your interests." The owners of the vessel then telegraphed, "Is ship afloat or not, if possible make all agreements no cure no pay."

In the meantime the plaintiffs' manager had sent to the various steamship agents in Port Said, to the Suez Canal Company, and to the Egyptian Post Office Administration; but all applications for assistance met with refusal, either on the ground of tugs not being available, or on account of the risk to which craft would be exposed in attempting, in an open seaway, to get the vessel off.

Thereupon the manager of the plaintiff company determined to employ the company's staff and plant, and, under his directions,

1892

THE KATE B. JONES.

the marine superintendent started two tugs, the *Fannie* (37 tons gross, 150 horse-power effective, eleven hands), and the *Agnes* (31 tons, 100 horse-power effective, eight hands), with two lighters in tow, each of 140 tons, and manned by twenty-five hands, the whole under the charge of the sub-manager, and provided with an anchor, chain cable, ropes, provisions, stores, and water.

The tugs and lighters reached the *Kate B. Jones* at 3 P.M. on April 7, when the sub-manager found the vessel ashore, about twenty-five miles from Port Said, and about two miles off the Egyptian coast. She was rolling and bumping on a sandy bottom with her head N.W. by W., and since grounding, at 7.20 P.M. on the evening of the 5th, the strong wind and ground swell had set the vessel further inshore. Her draught of water when afloat was 19 ft. 4 in. forward, and 20 ft. 10 in. aft; but, having worked herself into the sand, soundings shewed 16 ft. forward deepening to 17 ft. aft.

The chief officer had been sent away at daylight on the 6th in the lifeboat with five men to Damietta to telegraph for assistance; but he was driven to the westward, and the boat, having been swamped, was abandoned. She was subsequently recovered by the plaintiffs; but the chief officer and the crew of the lifeboat did not get back to the vessel for thirty-eight hours.

The anchor brought by the salvors was now taken out in a lighter, and let go about 170 fathoms on the starboard quarter of the *Kate B. Jones*, and, after considerable difficulty, that vessel's port anchor, and 100 fathoms chain, were carried out by a lighter, and laid off the starboard bow. By 7 P.M. the cables on both anchors were hauled taut, and the two tugs commenced to tow, whilst the engines of the *Kate B. Jones* were worked full speed astern; but the vessel did not move.

A second attempt to tow the vessel off proved equally unsuccessful, and, as the depth of water was insufficient to enable passing steamers safely to approach and assist in the towage, it was decided to discharge the cargo, the plaintiffs' manager telegraphing on the 8th to the owners of the vessel: "Steamer in sixteen feet, making no water, must lighter altogether 600 tons; 150 tons already discharged; laid out anchors, and tugged, but

1892

THE KATE B. JONES.

sandbank formed outside. Declined assistance *Abbey Moor*. Sending our tugs with more lighters and men; expect to float her to-morrow night. She must return here."

The two lighters returned in tow to Port Said with cargo, and about 2 A.M. on April 9 the tugs got back to the *Kate B. Jones* with four 135-ton iron lighters and 100 fresh labourers in charge of the assistant marine superintendent, who replaced his chief, incapacitated by fatigue. The same day the plaintiffs' manager telegraphed: "Have turned *Kate*; sending more lighters to-night; confidently expect bring her here Sunday. Six lighters full arrived here, over 400 tons."

This telegram referred to another attempt made to tow the vessel off; but it was only successful to the extent of moving her head round to about N.; and as it was found necessary to further lighten the vessel, the tugs, with four laden lighters, returned to Port Said. At 1 A.M. on the 10th the tugs again started for the ship, towing two large iron lighters, each of 220 tons capacity, prepared for the work by the inspecting engineer. These reached the vessel about 10 A.M., and were joined by two Arab dhows chartered by the sub-manager for the work. All these took their cargoes to Port Said the same night, and the tug *Fannie* at once returned, with two large native craft in tow, reaching the *Kate B. Jones* at daylight on the 11th.

By 9.30 A.M. a total of 1150 tons of wheat had been got out of the ship; and then, the tug *Fannie*, towing off the starboard bow, whilst a strain was kept on the cables, and the engines of the *Kate B. Jones* put full-speed ahead, the vessel, about 10 A.M., worked her way through the sand into deep water, and proceeded, under her own steam, to Port Said.

The plaintiffs' manager telegraphed to the owners that they had discharged the above amount of cargo, that the vessel had come off apparently unhurt, and that they were doing all that was needful. The owners of the vessel replied, acknowledging the manager's telegrams of the 9th and the 11th, and adding, "We are very pleased to hear that your efforts have proved satisfactory, and now hope she will get a seaworthy certificate before reloading."

The plaintiffs' manager, relying on information he had received

1892

THE KATE B. JONES.

as to the values, suggested remuneration at the rate of 5 per cent., which he reckoned would produce over 3000*l.*, and on the 12th he telegraphed to the owners of the vessel, "Want master sign agreement pay for salvage 5 per cent. value on ship, freight, and cargo. Please wire authority." This telegram was followed by a letter, written the same day, in which he gave a full account of the operations, and said: "We confirm our telegram as to our very moderate demand for 5 per cent. on the value of ship, freight, and cargo. It is thought here that we ought to have asked 10 instead of 5. There is no other firm here who could have saved the *Kate B. Jones*, except the Canal Company, and they would not."

The owners of the vessel replied by telegram: "We request settlement stand over until all particulars ascertained, meantime will give security for salvage."

On April 18 the reloading of the vessel was completed. She left the following day, and, on arrival at Belfast, landed 25,024 bags of wheat.

In the meantime further correspondence ensued with reference to the claim for salvage, and, as no settlement was arrived at, the plaintiffs insured ship, freight, and cargo, on the homeward voyage (at a cost of 70*l.* 12*s.* 6*d.*) for 10,000*l.*, for which sum bail was demanded in the present action.

According to the affidavit filed on behalf of the defendants, the value of the *Kate B. Jones* was 16,000*l.*, her cargo 16,699*l.*, and gross freight 2706*l.* 2*s.* 3*d.*, reduced, by expenses of reloading, wages, and discharging, to 1771*l.* 4*s.* 6*d.* net, making a total of 34,470*l.* 4*s.* 6*d.*

The value of the plant risked by the salvors, and their expenditure, were as follows:—Tug *Fannie*, 4000*l.*; cost of repairs, &c., to her, 95*l.*; tug *Agnes*, 3000*l.*, and demurrage, 30*l.*; coals for both, 28*l.* 2*s.* 6*d.* Eight lighters, 7050*l.*, and estimated cost of repairs and demurrage 601*l.*; hawsers, 164*l.*; wages for 150 labourers, 166*l.* 12*s.*; hire of native craft, 119*l.*; anchor and cable lost, 123*l.* 16*s.* 8*d.*; fenders, 16*l.* 8*s.*—making a total value of 14,050*l.*, and expenditure 1343*l.* 19*s.* 2*d.*, of which about 600*l.* was actual, and the rest estimated.

By their statement of claim the plaintiffs set out the facts as

1892

THE KATE B. JONES.

to the salvage services, and claimed "such an amount of salvage as to the Court may seem just."

By their defence, the owners of the *Kate B. Jones*, her cargo, and freight, admitted the allegations as to the services rendered, and said "that the plaintiffs, the Port Said and Suez Coal Company, before, and at the time of, rendering the services alleged, were the agents at Port Said for the defendants, the owners of the *Kate B. Jones*, and for that steamship, and rendered the said services in their capacity as such agents; and that the other plaintiffs are the servants, employés, and workmen of the plaintiff company"; and the defendants paid into Court 1723*l.* 10*s.*, being 5 per cent. on the value of the *Kate B. Jones*, her cargo and freight, and said that that was sufficient to satisfy the claim of the plaintiffs.

Pyke, Q.C., and *F. Laing*, for the plaintiffs.
Sir Walter Phillimore, and *Butler Aspinall*, for the defendants.

The arguments of counsel fully appear from the judgment, and all the cases cited on both sides are mentioned therein.

GORELL BARNES, J. (after stating the nature of the case, proceeded). It appears from the evidence that the plaintiffs at Port Said had coaled this vessel shortly before she stranded. Their course of business seems to have been to supply coals to vessels which were their customers on production of a coaling order, which the owners of such vessels obtained by making contracts with, in this case, the firm of Mann, George & Co., the name of Mr. Royle, the manager of the company at Port Said, being mentioned in that contract to supply the coal. Having made that contract, the owners obtained a coaling order, and the plaintiffs supplied the coal, paying Messrs. Mann, George & Co. a commission on it. The plaintiffs also pay the pilot dues, canal dues, and other expenses, making the profit they obtain only upon the sale of the coal. There is no charge whatever to the owners of the ship; but they do this business, and get remuneration out of the sale of the coal.

I think I have shortly described the business in which Mr. Royle, as the manager of the plaintiff company, is engaged.

1892

THE KATE B. JONES.

Gorell Barnes, J.

They are in no sense general agents, and when a vessel has left the port they have nothing more to do with her. On this occasion the steamer having left the port, stranded on a sandy bottom on the coast of Egypt, in a position twenty-five miles from Port Said and seven miles E.S.E. of Damietta Light. She seems to have gone on at full speed, and was drawing something like nineteen feet forward, and twenty feet aft. She afterwards worked herself further forward, and remained fast.

In this state of things the plaintiffs' manager, Mr. Royle, telegraphed to the owners. [The learned judge went through the main portion of the correspondence, already set out, and continued:—] In substance the correspondence comes to this, that the 5 per cent. proposal by the plaintiffs was not accepted by the owners, and therefore a correspondence took place as to the amount of bail to be given. The case was treated throughout by both parties as a salvage case, and the end of it was that it was brought into Court, and the defendants have paid into Court 5 per cent. of what was then ascertained to be the value of the ship, freight, and cargo.

The first point raised in the case is, that the plaintiffs are to be treated only as agents. It is not really contended that they are not to be treated as salvors. I think the cases are too strong for Mr. Butler Aspinall to maintain that position, and I do not think he pressed it. But the defendants' proposition is that the salvors ought to be considered to be in the position they are placed in by the correspondence which had taken place requesting them to render assistance. The particular weight they wish to give, I think, to that correspondence is this, that the plaintiffs do not, or did not, run so much risk of loss as independent salvors, because they might be entitled to some remuneration even if they had been unsuccessful. My opinion, after reading this correspondence, is that the defendants are probably right in that contention, and that where an agent is employed in this way, as has been stated in several cases, especially where he is requested to engage services which he will have to pay for, whether successful or not, he would be entitled to have what he had done considered, and to have some remuneration even if the matter turned out to be a failure. There are a number of cases

dealing with this subject, such as: *The E. U.* (1); *The Undaunted* (2); *The Cargo ex Honor* (3); *The Melpomene.* (4)

The award which I shall make is based on the principle that probably the risk of the entire loss of their expenditure if unsuccessful was one which the plaintiffs did not incur. I do not think it necessary to be absolutely certain about this, for it seems to me sufficient to say that probably that is the correct view to take. From the cases which have been cited before me, I cannot do better than quote a passage from *The Cargo ex Honor* (3), which sums up the law. Dr. Lushington says (5): "The Court, on previous occasions, has entertained similar applications to the present: *The Favorite* (6); *The Purissima Concepcion.* (7) In the case of *The Purissima Concepcion* (7), the Court went very fully into the question, and I think it unnecessary to occupy time in stating it with more particularity; but the result of it was this, that the Court would allow a claim as agent and a claim as salvor to be united and combined under particular circumstances. If the Court had not done that, and had attempted to draw the line in all cases where agency was claimed, assistance would have been refused, and it would have led to mischievous consequences. I shall not, therefore, refuse to consider the merits of the case."

I think this is a clear case in which the Court is bound to consider the merits, having regard to the circumstances under which the salvage services were rendered, and of course, the nature of the services. Now, what are they? Shortly stated, they are these. The tugs and lighters go to the assistance of the vessel, no other assistance being available. They then attempt, by means of laying out an anchor and by towing, to pull the ship off, but as she was laden these attempts were unsuccessful. There was a considerable ground swell. The wind was continually setting her towards the shore, and the only thing to be done was to discharge her.

On the 8th, 140 tons were taken out and taken by the lighters

(1) 1 Spks. 63.
(2) Lush. 90.
(3) Law Rep. 1 A. & E. 87.
(4) Law Rep. 4 A. & E. 129.
(5) Law Rep. 1 A. & E. 87, at p. 91.
(6) 2 Wm. Rob. 255.
(7) 3 Wm. Rob. 181.

1892

THE KATE B. JONES.

Gorell Barnes, J.

to Port Said. In the evening four 135-ton lighters went to the vessel, with 100 labourers, and on the 9th they had got out 400 tons. They tried to tow her again and failed, and the tugs and lighters went back to Port Said after two vessels had declined assistance. On the 10th two lighters of 220 tons each were taken to the ship. They got there about six o'clock, as also did two native craft, which Mr. Tweedie engaged. One or two more attempts were made, and the vessel was moved a few feet, and then the lighters were taken to Port Said. On the 11th, when the lighters had taken 1150 tons in all out of the ship, she floated. This was not quite half her cargo, which was valued at £16,699. If it had not been for this lightening, the steamer could not have got away without jettisoning her cargo, and that would have involved a loss of £7000 or £8000. She was towed off about ten o'clock on the morning of the 11th, and reached Port Said with the rest of her cargo. The weather seems to have been somewhat severe—a strong E.N.E. wind. It must be remembered that paragraph 16 of the statement of claim is admitted, which says that "the same night the wind and sea considerably increased, and heavy weather continued to prevail for a number of days." In rendering the services heavy expenses were incurred by the salvors, which, as regards out-of-pocket expenses, may be roughly put at about £600; the £700 more for estimated expenditure may probably require some discounting; but the labour of the salvors was very severe, and there was damage to some extent to the lighters. The company's business must also have suffered complete disorganization in consequence of the tugs and lighters being away. It must be further remarked that there was considerable risk to the craft and tugs, which, according to the statement in the pleadings, or according to Mr. Royle's evidence, could not with any facility have been replaced. It is obvious that the services were of an arduous and of a somewhat dangerous character. What is the position from which that vessel was salved? It is clear that she was in great risk, without assistance, of becoming a total loss. She was buried in the sand, unable to move herself without getting rid of all this cargo, and wanting towage assistance. In that dangerous position her risk of total loss was almost certain,

and there was no other assistance available. Taking these facts into consideration, and bearing in mind the position of the parties, I think that the sum suggested by Mr. Royle was quite inadequate if taken on the values in this case. I have to fix what in such a case would be a really just remuneration. The conclusion I have come to, assisted as I have been very materially by the Elder Brethren, is that, though the award might have been exceeded if no relationship had existed between the parties, the sum which will, under the circumstances, represent the proper remuneration, will be £3500.

1892

THE KATE B. JONES.

Gorell Barnes, J.

Solicitors for plaintiffs: *Ingledew, Ince, & Colt.*
Solicitors for defendants: *Thomas Cooper & Co.*

T. L. M.

BERNSTEIN *v.* BERNSTEIN, SAMPSON, AND TURNER.

1892 *July* 12.

Divorce—Husband's Petition—Dismissal of Petition—Condonation—Second Petition—Damages.

A husband having presented a petition for divorce charging his wife with adultery with a named co-respondent, condoned the offence and allowed the petition to be dismissed. Subsequently he presented a second petition charging his wife with adultery with a second co-respondent, and obtained leave to amend such petition by adding to it the charges in the petition against the first co-respondent, which had been dismissed, by inserting a claim for damages against him; and by making him a co-respondent:—

Held, on motion to dismiss the first co-respondent from the suit that the condonation was no bar to the claim for damages.

Pomero v. *Pomero and Hadley* (10 P. D. 174) followed.

APPLICATION by a co-respondent to be dismissed from the suit.

This was a petition by the husband praying for a dissolution of the marriage on the ground of his wife's adultery with two co-respondents.

On January 14, 1892, the petitioner presented a petition praying for a divorce on the ground of his wife's adultery with the co-respondent Turner, and in the course of the proceedings in the suit it came to the knowledge of the co-respondent that the petitioner and the respondent were living together. On January 19 he followed them to an hotel, where he ascertained that

1892

BERNSTEIN v. BERNSTEIN.

they passed the night together; and this fact was subsequently admitted by the petitioner in an interview which the co-respondent had with him and the respondent. On January 29 his solicitors received a letter from the petitioner's solicitors to the following effect: "Please take notice that the petitioner abandons his petition, he having condoned the adultery alleged against your client;" and on February 18 the petition was accordingly dismissed by the registrar by consent, no order being made as to costs.

On March 14 the petitioner filed another petition, in which he charged his wife with adultery with Carl Auguste Sampson; and on April 11 the petitioner obtained leave to amend his petition by adding the charges against Turner contained in the petition which had been withdrawn, and a claim for damages for 3000*l.*, and by making him a co-respondent. The petitioner filed an affidavit, in which he alleged that the condonation had been obtained by fraud, and by the denial of Turner that he had misconducted himself with the respondent, which he had since ascertained to be untrue. The co-respondent Turner, in his answer, denied the adultery, and alleged that, if it had been committed, it had been condoned.

B. Deane, on behalf of the co-respondent Turner, moved that the petition be dismissed as against him. *Norris* v. *Norris, Lawson, and Mason* (1) shews that the petitioner, having condoned his wife's adultery with Turner, has no further remedy against him. If he has any remedy, it is against the other co-respondent, Sampson; but by condonation he has waived all his claim against Turner, as no new adultery with him is charged. The subsequent adultery might revive the condoned adultery as against the wife, but not against Turner. The only object of making him a co-respondent is to claim damages.

Inderwick, Q.C. (*Kisch*, with him), for the petitioner. The petitioner does not deny the condonation; but he asserts that it was obtained by fraud and misrepresentation, and there is a substantial question for a jury to decide—whether there was any condonation. *Pomero* v. *Pomero and Hadley* (2) is an authority

(1) 30 L. J. (P. & M.) 111; 4 Sw. & Tr. 237. (2) 10 P. D. 174.

for holding that condonation is no answer to a husband's claim for damages.

1892

BERNSTEIN v. BERNSTEIN.

THE PRESIDENT. Apart from the question of damages, I should have been indisposed to grant this application, because I think it is desirable that the pleadings should be completed, and that the circumstance of the alleged condonation should be before the Court. But the case cited, *Pomero* v. *Pomero and Hadley* (1), which shews that condonation is no bar to a claim for damages, leaves me no option, and the motion, therefore, must be refused.

Solicitors for petitioner: *Beyfus & Beyfus.*
Solicitors for respondent: *Emanuel & Simmonds.*

W. L.

IN THE GOODS OF FULLER.

1892 *July* 12

Probate—Will—Execution—Foot or End—Lord St. Leonard's Act (15 & 16 *Vict. c.* 24), *s.* 1.

The whole of the disposing portion of a will was written on the first side of a sheet of foolscap; the second and third sides were blank; and the attestation clause with the signatures of the testator and the witnesses were on the fourth side:—

Held, that the will was duly executed.

APPLICATION for probate.

Arthur Fuller, late of Chobham in the county of Surrey, deceased, died on May 1, 1892, leaving a will bearing date April 30, 1892.

The will was drawn by Thomas Warren, who was appointed by it sole executor. The whole of the disposing portion of the will was written on the first side of a double sheet of foolscap, and, there not being sufficient room at the bottom of the page for the signatures of the testator and the attesting witnesses, Warren turned over the sheet and wrote the attestation clause on the middle of the fourth page, where the will was duly signed and attested.

R. H. Pritchard, moved for probate. The signature is so placed, in the language of Lord St. Leonard's Act, "at or after

(1) 10 P. D. 174.

1892

IN THE GOODS OF FULLER.

or following or under or beside or opposite to the end of the will" as to make it "apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will." The Court may presume that the sheet of foolscap was never opened, and that when the will was written the sheet was turned over with the second and third pages closed, and the signatures written on the fourth page, which would be at the end of the will.

[He cited *In the Goods of Catherine Rice.* (1)]

THE PRESIDENT made the grant as prayed.

Solicitor: *H. St. John H. Bashall.*

W. L.

1892

July 26.

IN THE GOODS OF SARAH SOPHIA MOORE.

Probate—Will—Codicil—Words of Revocation included in Will without the Knowledge of Testatrix—Omission.

A testatrix by her will constituted her illegitimate son her universal legatee and one of her executors. After the execution of the will, and shortly before her death, she expressed a wish to bequeath part of her furniture and other personal effects to her sister, her sole next of kin and heiress-at-law, and proceeded to write out a bequest giving effect to such wish on a printed form of will, which was duly executed. The form commenced by a clause of revocation; but the testatrix did not fill up the blanks in this part of the form; and the clause was not read over to her at the time of execution, though the rest of the will was, and there was no evidence that she knew of such clause:—

Held, that, under the circumstances, probate might be granted of the paper, omitting the clause of revocation, as a codicil to the original will.

APPLICATION for probate of two testamentary papers with the omission of a clause of revocation from the latest in date.

Sarah Sophia Moore, late of Kingston-on-Hull, in the county of York, died May 13, 1892, leaving her natural and lawful sister, Mrs. Annie Rebecca Escreet, her sole next of kin and the only person entitled in distribution.

By a will duly executed on December 7, 1887, she bequeathed all her real and personal estate to her illegitimate son, Joseph

(1) 5 Ir. Eq. 176.

1892

IN THE GOODS OF MOORE.

Harrington Moore, now resident in Queensland, with remainder to his wife and children, and she appointed him and her nephew, John Francis Henry Escreet, her executors.

Shortly before her death she expressed a wish to alter her will by leaving to her sister a portion of her furniture, and for this purpose she procured a printed form of a will, which she filled up in such terms as she thought would carry out her intentions. The printed form commenced as follows:—

"This is the last will and testament of me, —— of ——, in the county of ——.

"I hereby revoke all wills and testamentary instruments heretofore by me made. I appoint —— of ——, and —— of ——, to be the executors of this my will. I direct my executors to pay my just debts and testamentary and funeral expenses."

The testatrix did not fill up these blanks, but added two paragraphs on the first and second pages of the form, by one of which she bequeathed certain articles of furniture, pictures, and bronzes to her son, Mr. Moore, and by the other she bequeathed to her sister, Mrs. Escreet, all her wearing apparel, jewelry, plate, curios, beds, kitchen furniture, &c.

From the affidavits of Mrs. Escreet, the deceased's sister, of Mr. Escreet, her executor, and of the attesting witnesses, it appeared that at the time of the execution of this paper on April 21, 1892, the testatrix, who was in bed, produced it from a writing-desk, and asked Mr. Escreet to read it over to her. He commenced to read at the paragraph containing the bequest to Mr. Moore, then turned over the page and read that relating to Mrs. Escreet, but he did not read any of the printed words containing the clause of revocation, nor was the attention of the deceased called to them in any way at the time. The attesting witnesses stated that they were not aware of the nature of the document which they were asked to sign, and all they saw of it was the printed attestation clause.

Mrs. Escreet, the deceased's sole next of kin and heiress-at-law, had filed a consent to the grant of probate of both papers with the words of revocation omitted.

Searle, moved for a grant of probate to Mr. Escreet of the will

1892

IN THE GOODS OF MOORE.

of 1887 and the testamentary paper of 1892 with the words of revocation omitted.

[He cited *In the Goods of Oswald* (1), where words of revocation inserted per incuriam were ordered to be omitted from the probate.]

THE PRESIDENT. There is no reason to suppose that the testatrix intended to revoke her previous will. These words of revocation were not called to her attention at the time, nor is there any evidence to shew that she knew they were there, and, on the authority of the case cited, they may be omitted. Probate may, therefore, go of the will of 1887 with the testamentary paper of April 21, 1892, as a codicil thereto, omitting the revocation clause.

Solicitors: *Rowcliffes, Rawle, & Co.*

W. L.

1892
Aug. 9.

IN THE GOODS OF RUSSELL.
IN THE GOODS OF LAIRD.

Probate—Will—Executor according to the Tenor.

Trustees nominated by a testator "to carry out this will," and "for the due execution of this my will":—

Held, to be thereby constituted executors according to the tenor and entitled to probate.

APPLICATIONS for probate.

Thomas Russell, deceased, late of Heckmondwike, in the county of York, died April 9, 1891, having duly made and executed his last will and testament on the same day.

By this will he bequeathed all his real and personal estate to Harriet Ellis, subject to the condition that she should pay to her sister, Eliza Russell, the sum of 6*s*. a week during her life; and the will concluded in these words: "And I nominate as trustees to carry out this will the said Harriet Ellis and Patrick Maloney of Hyde, in the county of Chester."

Priestley, moved for a grant of probate to the trustees as

(1) Law Rep. 3 P. & D. 162.

executors according to the tenor, and referred to *In the Goods of Baylis.* (1)

1892

IN THE GOODS OF RUSSELL.

IN THE GOODS OF LAIRD.

THE PRESIDENT made the grant.

Andrew Laird, deceased, late of St. Mary's Cray, in the county of Kent, died June 28, 1891, leaving a duly executed holograph will, dated August 4, 1885.

By his will he left all the property of which he might die possessed to his wife for her life—with the exception of two legacies of 100*l.* each to his son, Robert William Laird, and his daughter, Mary Anne Laird—and after her death between his two children in equal shares. The will concluded in these words: "And for the due execution of this my will I hereby nominate and appoint as trustees my wife, the said Jane Sarah Laird, my son, the said Robert William Laird, and my daughter, the said Mary Anne Laird, with power to add to their number as may seem necessary."

Barnard, moved for a grant of probate to the trustees as executors according to the tenor.

THE PRESIDENT. I think that this case as well as the last falls within the principle that where the direction is to carry out the general provisions of the will, and not to execute a specific trust, the trustees are executors according to the tenor. The grant, therefore, may go as prayed.

Solicitors in Russell's case: *Torr & Co.*

Solicitors in Laird's case: *Carr & Martin.*

(1) Law Rep. 1 P. & D. 21.

W. L.

Applied. ELWES *v.* ELWES. [1950] 1 All E.R. 826. *Followed.* E. *v.* E. [1950] P. 232

1892 MOORE *v.* MOORE (QUEEN'S PROCTOR SHEWING CAUSE).

July 15.

Divorce—Wife's Petition—Decree Nisi not made Absolute—Petitioner married again—Resumption of Cohabitation with Respondent—Condonation—Cruelty—Revival—Discretionary Bar—Decree Absolute—20 & 21 *Vict.* c. 85, *s.* 30.

In a petition by the wife for a divorce on the ground of adultery and cruelty, a decree nisi was pronounced; but no steps were taken to make it absolute. The petitioner believing that the marriage was dissolved at the end of six months, went through a form of marriage with a man with whom she cohabited for some years until he died. She then resumed cohabitation with the respondent; but he was guilty of cruelty towards her, and she left him after living with him a year and nine months:—

Held, upon an application by the petitioner to make the decree nisi absolute, the Queen's Proctor intervening, that there was nothing in the circumstances to prevent the cruelty of which the respondent had been guilty during the second cohabitation from reviving the matrimonial offences on the ground of which the decree nisi had been pronounced, and that inasmuch as it must be taken that she went through the form of marriage with another person in the honest belief that her marriage with the respondent was dissolved, the Court was entitled to make the decree nisi absolute.

APPLICATION to make a decree nisi absolute on an intervention by the Queen's Proctor shewing cause.

This was a petition by the wife for the dissolution of her marriage on the ground of her husband's adultery and cruelty. The husband had not filed an answer and did not appear, and a decree nisi was pronounced on June 20, 1884, which gave the wife the custody of the two children of the marriage. The petitioner, who was a German by birth, took no steps to have the decree made absolute, and it appeared that in May, 1885, she went through a ceremony of marriage with James Browne, with whom she cohabited until his death, which happened in June, 1889. In February, 1890, she met her husband, who urged her to resume cohabitation with him in the interests of the children of the marriage, pointing out to her that she was still his wife, and that she had made herself liable to serious consequences by reason of her marriage and cohabitation with Browne. Accordingly she returned to cohabitation, and continued to live with him until November, 1891, when she finally left him on the ground of his cruelty. She was advised by a solicitor whom she

consulted to lay the circumstances of her case before the Queen's Proctor, and the Queen's Proctor after inquiries satisfied himself that there was no reason to doubt the truth of her statement, that when she went through the ceremony of marriage with Browne she believed that her marriage with Moore had been dissolved by the decree nisi, and that, though she knew she could not marry again until six months had elapsed, she was not aware of the necessity of taking any steps to have it made absolute.

On the other hand, it appeared from the letter-book of the solicitors who acted for her in the petition that in January, 1885, three months before she went through the ceremony with Browne, they had written to her in these terms: "We remind you that the time has now some time passed when the decree could be made absolute, but we cannot proceed without funds." But the petitioner alleged that she had no recollection of ever having received such a letter, and there was no evidence that it had ever reached her.

The Queen's Proctor thereupon intervened and filed pleas setting out the circumstances of the case, leaving the matter to the judgment of the Court. The petitioner appeared and was examined, and other witnesses were called to prove the cruelty of her husband during her second cohabitation with him.

The case was heard before Gorell Barnes, J.

Guy Stephenson, for the Queen's Proctor, drew the attention of the Court to the following passage in the judgment of Lord Blackburn in *Collins* v. *Collins* (1):—"But assuming it to be now established English law that a matrimonial offence though forgiven may be revived by any other matrimonial offence of which the Court takes cognisance, it is very modern law, and not, I think, so obviously just and expedient that we ought to infer, contrary to all the Scotch authorities for the last three centuries, that it either was or ought to have been introduced into the law of Scotland in the 16th century."

Bromby, for the petitioner, submitted that on the authority of *Noble* v. *Noble and Godman* (2), the Court had discretion to make

(1) 9 App. Cas. 241. (2) Law Rep. 1 P. & D. 691.

1892

MOORE v. MOORE

the decree absolute, and that on the authority of *Dent* v. *Dent* (1) the respondent's subsequent cruelty revived the adultery and cruelty of the respondent which had been condoned. [He also cited *Durant* v. *Durant*. (2)]

GORELL BARNES, J. The case of *Dent* v. *Dent* (1) appears to me to be precisely in point on the question of revival of a matrimonial offence, and I do not see that the observations of Lord Blackburn in *Collins* v. *Collins* (3) overrule that decision. The facts of this case are somewhat peculiar. The marriage between the parties took place in March, 1874, and in June, 1884, a decree nisi dissolving it was made on the ground of the husband's adultery, coupled with his cruelty. That decree was never made absolute; but in May, 1885, the petitioner went through a form of marriage with a man named Browne. She alleges that she was ignorant of the fact that it was necessary for her to take some proceeding to have it made absolute. Her idea seems to have been that six months must elapse before the marriage was dissolved; but she was not aware that she had to move to make the decree absolute. Against this it is said that she had received a letter from the solicitor, the effect of which would be to bring it to her mind that she had to take further proceedings. But I am not satisfied that she received that letter; and even if she had it may be that the only impression which it might produce on her mind would be that she had to find more money. The result is that, having regard to the circumstances and the way in which she gave her evidence, and also having regard to the fact that from her German origin she may not have been fully alive to the necessary details of procedure, I think she honestly believed—and the Queen's Proctor also seems to have come to that conclusion—that she was legally right in going through the ceremony of marriage with another person. According to the decision in *Noble* v. *Noble and Godman* (4), if the Court is satisfied that the petitioner, in going through the form of a second marriage, honestly believed that she

(1) 34 L. J. (P. & M.) 118; 4 S. & T. 105.
(2) 1 Hagg. Ecc. 733.
(3) 9 App. Cas. 241.
(4) Law Rep. 1 P. &. D. 691.

was entitled to do so by reason of the decree nisi, she ought not to be debarred from obtaining her decree absolute. A further point arises on this case, which is one of some novelty, and has not been the subject of any previous decision. It arises thus: In June, 1889, the man Browne died; and the petitioner some time in the following year seems to have met the respondent, who informed her of her position in consequence of the decree nisi not having been made absolute, and invited her to resume cohabitation. She apparently thought it was for the interests of her children that she should renew cohabitation, and she continued to live with him until he treated her with great cruelty. No doubt that cohabitation was in itself a condonation of the former marital offences; but I cannot see why the fact that the petitioner went through a form of marriage with another person should debar her from the benefit of the ruling in *Dent* v. *Dent* (1), that condonation is only conditional, and that a matrimonial offence committed after condonation revives the offences committed before it. It follows, therefore, that the subsequent cruelty of her husband places the petitioner in the position which she occupied when she obtained a decree nisi, and entitles her to have that decree made absolute. I therefore dismiss the Queen's Proctor's intervention, and the decree will be made absolute on the usual affidavits.

Solicitors for the petitioner: *J. D. Langton.*
Solicitor for the Queen's Proctor: *Sir A. K. Stephenson.*

(1) 34 L. J. (P. & M.) 118; 4 S. & T. 105.

W. L.

1892
July 29.

[IN THE CONSISTORY COURT OF LONDON.]

IN THE MATTER OF LIEUT.-COL. DIXON.

Ecclesiastical Law—Faculty—Discretion—Refusal to grant Faculty for removal of Dead Body intended to be cremated—Service of Notice of Application on Executors—Practice as to Grants of Faculties for Burial in accordance with expressed Wishes of Deceased.

The dead body of a testator whose will contained no directions as to the mode or place of his burial, but who had expressed a wish that his wife should have the option of disposing of his remains in one of two ways, either by burial or cremation, was buried by his widow in a mausoleum in the consecrated part of Kensal Green Cemetery. Eighteen years afterwards the widow applied to the Court for a faculty for the removal of the remains from the mausoleum where they had been so buried to the crematorium at Woking for the purpose of being there cremated, the ashes resulting from the cremation to be then placed in an urn, and the urn and its contents deposited in the mausoleum. The Court having directed that the executors of the will, if living, should have notice of the application, and that evidence should be brought in as to whether the cremation could be carried out without any difficulties as to sanitation, it appeared that the executors were dead and that the cremation could be carried out so as to be perfectly decent and harmless to health:—

Held, that the faculty must be refused.

The Court is accustomed in proper cases to grant faculties for the removal of remains buried in consecrated ground for the sole purpose of such remains being re-interred in other consecrated ground, and would not be justified in granting a faculty for enabling remains to be removed after burial for cremation; but *semble*, where there has been a previous cremation in pursuance of directions left by the deceased, there is no legal objection to the ashes resulting therefrom being buried in consecrated ground, accompanied with the use of the Burial Service.

THIS was an application on behalf of Mrs. Eliza Dixon, of 49, Albany Street, Regent's Park, Middlesex, widow of Lieut.-Col. John Dixon, late of 18, Seymour Street, Portman Square, Middlesex, for the grant of a faculty authorizing the applicant to remove the remains of the said John Dixon, her said late husband, from a mausoleum in the consecrated portion of All Souls Cemetery at Kensal Green, Middlesex, and convey the same to the crematorium at Woking, Surrey, for the purpose of such remains being there cremated and the ashes resulting from such cremation being deposited in an urn and placed in the said mausoleum in All Souls Cemetery aforesaid.

1892

IN RE DIXON.

The petition to lead to the grant of the faculty, together with an affidavit of Mrs. Dixon verifying the same, was brought into the registry on or about May 11 last. Such petition, after statements to the effect that the dead body of Lieut.-Col. Dixon having on April 11, 1874, been deposited in a leaden coffin in the consecrated portion of Kensal Green Cemetery, was, at the date of the petition, lying there in a mausoleum erected by Mrs. Dixon on consecrated ground, that Lieut.-Col. Dixon left a will appointing two executors, but did not therein give any directions whatever respecting his funeral or the disposal of his body, and that the remains of Lieut.-Col. Dixon had been so buried by the directions of Mrs. Dixon, alleged that Mrs. Dixon had given directions that after her death her body was to be cremated at Woking, in Surrey, and the ashes resulting from such cremation were to be deposited in an urn and placed in the said mausoleum, and that she was desirous that the remains of her said late husband might be removed and conveyed to the crematorium at Woking aforesaid for the purpose of such remains being there cremated, and undertook that immediately thereafter the ashes of the said John Dixon resulting from such cremation should be deposited in an urn and placed in the aforesaid mausoleum in the cemetery of All Souls, Kensal Green, aforesaid. The petition further alleged that the said John Dixon left no children or relations nearer in kin to him than cousins.

On June 1 last a further affidavit was filed in which Mrs. Dixon deposed that Lieut.-Col. Dixon had on several occasions, in conversations with her during his lifetime, expressed his thorough approval of the method of disposing of the dead by cremation; that he, however, had given her leave to dispose of his remains as she should think proper, either by burial or cremation, and that although she had caused his dead body to be deposited in Kensal Green Cemetery she had always had the intention that his remains, as well as her own, should subsequently be cremated, and felt that her present application for a faculty would have been thoroughly approved of by Lieut.-Col. Dixon.

1892. June 2. The application now came on to be heard before the Chancellor of London (Dr. Tristram, Q.C.).

1892

IN RE DIXON.

L. T. Dibdin, on behalf of the applicant. The present application is novel as to the facts, but involves no new principle of law, it being now settled, since the decision of Stephen, J., in *Reg.* v. *Price* (1), that cremation is legal if not done either in such a manner as to amount to a public nuisance or for the purpose of obstructing the course of justice. (2) The Court ought in its discretion to grant the faculty. It is, it is submitted, clear on the evidence that Lieut.-Col. Dixon approved of cremation, and would, if consulted, have been in favour of Mrs. Dixon making the present application after his death, whilst his will contains no directions which would be contravened if the proposed faculty was granted. Moreover, Mrs. Dixon is prepared to undertake that the ashes resulting from the cremation shall be placed in consecrated ground. The same weight should, therefore, be given to her wishes in this case as the Court is wont to give to the wishes of relatives who, in the absence of any testamentary directions of a deceased person to the contrary, apply to the Court for the removal of his remains from one consecrated burial-ground to another.

[DR. TRISTRAM. It is the invariable practice, where a faculty for the removal of remains is applied for, and it appears that the deceased has left a will and appointed executors, for the Court to ascertain before it disposes of the application whether the executors raise any objection to the grant.]

The testator has generally been buried by the executors, and the practice may have arisen because in such cases the property in his coffin is vested in them. In this case, however, Lieut.-Col. Dixon was buried by and at the cost of Mrs. Dixon, and the executors were put to no expense.

[DR. TRISTRAM. There is, I think, another difficulty in the way of granting the faculty, from the remains having been buried in a lead coffin, and the lapse of time—eighteen years—since the burial. I ought to have some evidence before me that, if the faculty is granted, the cremation could be carried out without any difficulties as to sanitation. It is a novel application, and I shall not deliver my judgment till next Court day. In the meantime, notice of the application must be given to

(1) 12 Q. B. D. 247. (2) See *Reg.* v. *Stephenson*, 13 Q. B. D. 331.

the executors of Lieut.-Col. Dixon's will, if they are living, and the applicant will have leave to bring in fresh evidence as to the actual process which would be followed in the cremation in the present case, especially with reference to the fact that the deceased is buried in a leaden coffin, and as to whatever is proposed to be done being harmless to health.]

Cur. adv. vult.

Subsequently two affidavits were filed in the registry. By one of such affidavits it appeared that both the executors named in the will of Lieut.-Col. Dixon were dead, and in the other of such affidavits the honorary secretary to the Cremation Society of England deposed that there had been more than one instance where human remains deposited in a leaden coffin had been dealt with by cremation, the practice in such cases being not to open the leaden coffin, but to place the whole coffin as it was in the crematorium, and expose the whole to the action of fire; that there would be no difficulty, if the faculty was granted, in the cremation of Lieut.-Col. Dixon's remains in the above-mentioned manner, whilst the separation of the ashes from the lead could be easily arranged, and that the deponent was convinced that the whole proceeding could be carried out, and would be in every respect perfectly decent and harmless to health.

Cur. adv. vult.

July 29. DR. TRISTRAM. In this case the Court is asked to grant a faculty to enable the remains of Lieut.-Col. Dixon, late of No. 18, Seymour Street, Portman Square, to be removed from the consecrated cemetery at Kensal Green to the Woking Crematorium, with a view to their being there cremated, and to the ashes of the remains being afterwards deposited in an urn and returned to their present place of burial.

Colonel Dixon died as far back as the month of April, 1874, leaving a widow, but no children. He left a will, which contains no directions as to the mode or place of his burial, and the executors of the will are dead.

The petitioner for the faculty is his widow. She states in her

1892

IN RE DIXON.

Dr. Tristram.

affidavits that she is in feeble health, and that she has given directions that upon her death her remains are to be cremated at Woking, and afterwards deposited in an urn and placed in the mausoleum, in which the remains of her husband now rest, and that she is desirous that his remains should be similarly dealt with. She states also, that in conversations which she had with him he expressed approval of the disposal of the dead by cremation, and that he gave her leave to dispose of his remains as she should think proper, either by burial or cremation, and that when his remains were deposited in the cemetery she intended that they should be subsequently cremated, as well as her own.

There are only two cases in the reports which bear directly on the subject of cremation. The one is that of *Reg.* v. *Price* (1), in which Stephen, J., held that it was not a misdemeanour to burn a dead body, unless it were done so as to amount to a public nuisance, or with a view to prevent a coroner's inquest being held upon it. The other is that of *Williams* v. *Williams.* (2) In that case Mr. Henry Crookenden, by a codicil to his will, directed that within three days after his death, or as soon as convenient might be, his body should be given to his friend Eliza Williams, to be dealt with by her as he had directed her in a letter (in which he had desired her to cremate it), and directed that any expenses incurred by her in carrying out these instructions should be repaid her by his executors. The body of Mr. Crookenden was buried by his executors in the unconsecrated part of the Brompton Cemetery, in December, 1875. In March, 1876, Miss Williams applied to the Home Secretary for a licence to remove it for cremation, and afterwards for its burial in a churchyard, or if there were legal objections to cremation, for its removal only for burial in a churchyard. The Home Secretary refused permission for its removal for cremation, but granted it for reburial in a churchyard. Under this licence Miss Williams, without previous notice to the executors (feeling herself under an obligation to fulfil her promise to the deceased to cremate him), removed the body to Italy, where she had it cremated, and she had the ashes sub-

(1) 12 Q. B. D. 247. (2) 20 Ch. D. 659.

1892

IN RE DIXON.

Dr. Tristram.

sequently buried in a churchyard in Wales; whereupon she claimed the expenses of the cremation and reburial (321*l.*) of the executors. Kay, J., refused to allow her the expenses out of the estate, on the ground that the removal was illegal.

The law, as laid down by Kay, J., and in other cases, is that as there can be no property by the law of this country in a dead body, a person cannot dispose of his body by will, and that after death the custody and possession of the body belongs to his executors until it is buried, and when it is buried in consecrated ground it remains under the protection of the Ecclesiastical Court of the diocese, and cannot be removed from the grave or vault, or mausoleum in which it has been placed, except under a faculty granted by an Ecclesiastical Court, and then only to another grave or vault in consecrated ground.

Mr. Dibdin, in moving for the faculty submitted, that, although there was no precedent for the application, it might be granted to gratify the wishes of the widow, in like manner as the Court would grant a faculty for the removal of remains from one part to another part of a churchyard, or from one churchyard to another churchyard, in deference to the wishes of members of the family, unless the deceased has left contrary directions in his will.

Where the deceased has left no testamentary or clear directions as to the place of his burial, the practice of the Court is to grant a faculty to proper parties, on reasonable grounds shewn and subject to proper precautions, to remove the remains to another grave or vault in the same or in another churchyard; but where the deceased has himself expressed a wish to be buried in that or in any other churchyard, the invariable practice of the Court is by a faculty to give effect to such wish.

Thus, on referring to the registers of the Court, I observe that in June, 1775, Sir William Wynne, on the application of the executors of Elizabeth Raiss, whose remains had been interred by them in August, 1774, in a brick grave in the churchyard of Staines, decreed a faculty for their removal to a brick grave in the churchyard of St. Mary, Lambeth, on the ground that since the burial the executors had learned that whilst living she had declared that she wished to be interred in the church or church-

1892

IN RE DIXON.

Dr. Tristram.

yard of the last-named parish. Again, in *Smith* v. *Roberts* (1) which was heard in this Court in November, 1877, the question of the amount of weight to be given to the expressed wishes of the deceased, on an application for a faculty for the removal of her remains to New Zealand, was argued before me at considerable length, and fully considered. In that case Miss Annie Villeneuve Smith had come over to this country from New Zealand in November, 1876, with her father and mother, and died in the following April in London. During her last illness she extracted repeated promises from her mother, that in case it terminated fatally she would take care that she was buried in a particular spot in the churchyard of St. Barnabas, Warrington, New Zealand, the church of which had been erected by donations from, and by subscriptions collected by, her family. Her remains had been temporarily deposited at the time of her funeral in the catacombs of Kensal Green, marked "For removal," with a view to their reinterment in the churchyard at Warrington. Her mother applied for a faculty for their removal for this purpose. Her application was opposed at the instance of the representative in this country of her father, who was then on his way out to New Zealand, on the ground that the daughter, though of age, had died a spinster and intestate, and that her father was, therefore, her personal representative; that he had paid for her funeral expenses, and contemplated erecting a family mausoleum in England, to which he would wish to remove the remains of his daughter. The mother answered, that she had offered to pay the expenses of the funeral out of her own separate income, but that her husband insisted upon defraying them himself; that she was prepared to recoup him for the expenses he had incurred, and to defray herself the cost of the removal and reinterment in New Zealand. At the close of the argument, I expressed a strong opinion, that it was the duty of the Court in such a case to give effect to the wishes of the deceased; but being reluctant, in the father's absence, to give a decree against him, I directed a copy of the evidence, with an intimation of my opinion thereon, to be transmitted to him, and postponed giving judgment until he had been communicated with. In the result the father with-

(1) Not reported.

1892

IN RE DIXON.

Dr. Tristram.

drew his opposition, and on November 4, 1878, I ordered the faculty to issue.

There are objections which appear to the Court to be fatal to the present application.

In the first place, Mrs. Dixon does not by her evidence shew that what she now asks the Court to assist her in doing is what her husband wished to be done. He gave her the option of disposing of his remains in one of two ways, either by burial or cremation. She elected to dispose of them by burial, and eighteen years afterwards she asks the Court to assist her to exercise the second alternative, namely, that of cremating them. But the exercise of the second alternative is in excess of the power intended to be conferred on her by her husband, who might, from sentiment or otherwise, reasonably have objected to his remains being thus dealt with.

In the next place, by ecclesiastical as well as by common law, the body of every person dying in this country with certain exceptions is entitled to Christian burial : see Lord Stowell in *Gilbert* v. *Buzzard* (1), and *Regina* v. *Stewart*. (2) Can an executor, to gratify his own fancy, without the deceased's sanction, cremate the body of his testator, and so deprive it of being buried in the state and condition contemplated by this rule of law ? In the opinion of the Court, he would not be warranted in so acting ; and if this be so, the Court would not be justified in giving him the aid of its process to enable him so to act, unless it were satisfied that it would be thereby assisting him in giving effect to the wishes of the deceased. But the Court, upon the evidence before it, is not satisfied that the granting of this application would accord with the intentions of Col. Dixon.

Lastly, one result of being buried in consecrated ground is, that the site is under the exclusive control of the Ecclesiastical Courts, and no body there buried can be moved from its place of interment without the sanction of a faculty to be granted upon the application of the executors or members of the family, for reasons approved of by the Court, or upon the application of other parties upon the ground of necessity or of proved public

(1) 2 Hagg. Cons. 333, 343.

(2) 12 A. & E. 773.

1892

IN RE DIXON.

Dr. Tristram.

convenience, and then only for reinterment in other consecrated ground.

The Court is of opinion that it would not be justified in making a departure from this rule, which has now existed for centuries, and which by the terms of s. 25 of 20 & 21 Vict. c. 81, has become binding by statute, for the purpose of enabling a body to be removed after burial for cremation. When burial in consecrated ground and cremation are both desired, cremation should precede, and not follow, burial.

The Burial Service does not contemplate cremation. But where a body has been consumed in a fire, it has been customary to collect the ashes and to bury them in a churchyard, accompanied with the use of the Order for the Burial of the Dead, and there does not appear to the Court to be any legal objection to the same course being followed where there has been a previous cremation in pursuance of directions left by the deceased.

With every desire to accede to the wishes of Mrs. Dixon, the Court is bound, for the reasons given, to refuse to grant the faculty prayed.

Proctor for applicant: *Nelson.*

C. F. J.

1892

July 29.

[IN THE CONSISTORY COURT OF LONDON.]

THE RECTOR AND CHURCHWARDENS OF ST. MARY-AT-HILL WITH ST. ANDREW HUBBARD *v.* THE PARISHIONERS OF THE SAME.

Ecclesiastical Law—Faculty—The Burial Act, 1857 (20 & 21 *Vict. c.* 81), *s.* 23 *—Order in Council ordering that all Human Remains under a Parish Church be removed—Duty of Ecclesiastical Court to issue Faculty for Removal—Costs.*

The 23rd section of the Burial Act, 1857, enacts, inter alia, that, after the notice referred to in the section, "it shall be lawful for Her Majesty, upon the representation of one of Her Principal Secretaries of State by and with the advice of the Privy Council, from time to time to order such acts to be done by or under the directions of the churchwardens or such other persons as may have the care of any vaults or places of burial for preventing them from becoming or continuing dangerous or injurious to the public health . . . and that such churchwardens or other persons shall do or cause to be done all acts ordered as aforesaid, and the expenses incurred in and about the doing thereof shall be paid out of the poor rates of the parish." An Order in Council was

1892

RECTOR, &c., OF ST. MARY-AT-HILL WITH ST. ANDREW HUBBARD *v.* PARISHIONERS OF SAME.

made under the above section whereby it was ordered that the churchwardens of the parishes of St. Mary-at-Hill and St. Andrew Hubbard, in the City of London, or such other person or persons as might have the care of the vaults under the parish church of the said parishes, should adopt or cause to be adopted the following measures, viz., that all human remains found beneath the floor of the said parish church should be removed and forthwith reburied in Norwood Cemetery or some other consecrated burial-ground in which interments could legally take place; the work to be carried out under the supervision and to the satisfaction of the Medical Officer of Health for the City of London. After notice of this Order, the rector and churchwardens of the united parishes petitioned the Court for a faculty for the removal of the remains underneath the parish church to a consecrated site in Norwood Cemetery:—

Held, that the petitioners had taken the proper course, and that it was the duty of the Court to decree a faculty directing the churchwardens to do what was required to be done by the Order in Council, with provisoes inserted for the safeguard of the fabric of the church, and for authorizing the families of persons buried in the vaults to remove the remains of their relatives to any consecrated burial-ground they might select.

THIS was a cause of faculty instituted on behalf of the rector and churchwardens of the parish church of St. Mary-at-Hill with St. Andrew Hubbard, in the City of London, for the purpose of obtaining a faculty for the removal of remains buried in vaults underneath the floor of the said parish church to a site in a consecrated portion of the South Metropolitan Cemetery at West Norwood, in Surrey.

The petitioners alleged in their petition that a large number of remains had in former times been buried in vaults underneath the floor of the parish church of St. Mary-at-Hill, and, owing to the state of the said vaults, an unwholesome effluvia permeated from the said vaults into the church; that the Medical Officer of Health, having inspected the church, had reported that the retention of the remains in the vaults and underneath the church was dangerous and injurious to the congregation attending the services of the said church and to the neighbourhood, and the said church had been on sanitary grounds closed for public worship until the said remains should have been moved by proper legal authority, and that an order of the Queen in Council (1) under the Burial

(1) The Order in Council in question recites the 23rd section of the Burial Act, 1857 (see next note), and that a representation as required by that section had been duly given to the churchwardens of the parishes of St. Mary-at-Hill and St. Andrew Hubbard, and provides in terms as is set out in the judgment infrà.

1892

RECTOR, &c., OF ST. MARY-AT-HILL WITH ST. ANDREW HUBBARD *v.* PARISHIONERS OF SAME.

Act, 1857 (1), issued to the churchwardens of the parishes of St. Mary-at-Hill and St. Andrew Hubbard on May 9, 1892, directing the removal of all human remains beneath the floor of the said church and their reburial in Norwood Cemetery, meaning thereby the South Metropolitan Cemetery at West Norwood, Surrey, or some other consecrated burial-ground in which interments can legally take place, thereby enabling the churchwardens to charge the expenses of such removal on the poor rates of the said parish.

1892. June 17. The cause was now heard before the Chancellor for the diocese of London (Dr. Tristram, Q.C.).

Arnold Statham, appeared for the petitioners.

Witnesses in support of the petition were examined orally. The result of their evidence is stated in the judgment.

Cur. adv. vult.

1892. July 29. DR. TRISTRAM, Q.C. In the vaults underneath the church at St. Mary-at-Hill, in the City of London, a very large number of human remains have been buried. The last of these burials took place in 1844.

According to the reports of Dr. Sedgwick Saunders, the Medical Officer of Health for the City of London, and of Dr. Hoffman, the medical adviser of the Home Office, and the evidence of the churchwardens, an unwholesome effluvia permeates the church

(1) The 23rd section of the Burial Act, 1857 (20 & 21 Vict. c. 81), enacts: "It shall be lawful for Her Majesty, upon the representation of one of Her Majesty's Principal Secretaries of State, by and with the advice of Her Privy Council, from time to time to order such acts to be done by or under the directions of the churchwardens or such other persons as may have the care of any vaults or places of burial, for preventing them from becoming or continuing dangerous or injurious to the public health; and every such Order in Council shall be published in the *London Gazette*; and such churchwardens or other persons shall do or cause to be done all acts ordered as aforesaid, and the expenses incurred in and about the doing thereof shall be paid out of the poor rates of the parish: Provided always that no such representation shall be made until ten days' previous notice of the intention to make such representation shall have been given to the churchwardens or other persons, or one of the churchwardens or other persons having the care of the vaults or places of burial to which the representation relates."

from these vaults owing to their present condition; and, in the opinion of Dr. Saunders, such effluvia is injurious and may prove dangerous to the health of the congregation attending the services of the church.

The above facts having been represented to Her Majesty's Principal Secretary of State for the Home Department, an order of Her Majesty in Council was made, dated May 9, 1892, "upon the churchwardens, or such other person or persons as may have the care of the vaults under the church; to adopt or cause to be adopted the following measures—viz., that all human remains found beneath the floor of the parish church of the united parishes of St. Mary-at-Hill and St. Andrew Hubbard, in the City of London, shall be removed and forthwith reburied in Norwood Cemetery, or in some other consecrated burial-ground in which interments can legally take place, the work to be carried out under the supervision, and to the satisfaction, of the Medical Officer of Health for the City of London."

The Order in Council was served upon the churchwardens of the united parishes, who very properly applied to me, as chancellor of the diocese, for directions thereon.

In law the vaults in a church, as well as in a churchyard, are subject to the exclusive jurisdiction and control of the Bishop's Court, and no person is entitled to remove bodies from them without a faculty from that Court.

The Order in Council was issued under s. 23 of the Burial Act, 1857, which enacts:—[The learned Chancellor read the section, and proceeded:—] Where vaults in a church or churchyard are, or are likely to become dangerous or injurious to public health, one of two courses is open to churchwardens or parishioners, either to apply to the Bishop's Court for a faculty to authorize the removal of the bodies from the vaults, or to make a representation of the facts to the Home Secretary, with a view to obtain an Order of Her Majesty in Council directing their removal to take place, and so making the costs of and incidental to the removal chargeable on the rates of the parish.

When the application is made in the first instance to the Bishop's Court—and this is sometimes the most convenient course—the Court, on being satisfied of the necessity of the removal of

1892

RECTOR, &c., OF ST. MARY-AT-HILL WITH ST. ANDREW HUBBARD v. PARISHIONERS OF SAME.

Dr. Tristram.

the bodies on sanitary grounds, will direct a faculty to issue for that purpose, and if the churchwardens have no funds in hand wherewith to pay the costs incurred in relation to their removal, it will report the facts to the Home Secretary with a view to an Order in Council being issued, under the Act referred to, for the purpose of making such costs chargeable on the rates of the parish. It is convenient, however, that the Court should have before it, when the faculty is moved for, a report verified by affidavit or the oral evidence of the public sanitary authorities as to the state of the vaults.

Where an Order in Council for removal is obtained in the first instance through the Home Secretary, and served upon the churchwardens, their proper course is to apply, as the officers of the ordinary, to the Bishop's Court for a faculty to place them in a position to carry out the Order in Council under the directions of the Court; and it is the duty of the Court to issue such a faculty, and to see that the directions in the Order in Council are properly carried out by the churchwardens as officers of the ordinary.

The acts ordered to be done in the present case are to be done "by *the churchwardens or such other person or persons as may have the care of the vaults under the church of St. Mary-at-Hill.*" The churchwardens have in no sense the care of these vaults, unless it shall be given them by a faculty of this Court. The rector has, in a certain sense, the care of them, subject to the control of this Court, by reason of the freehold of the church being vested in him. The duties of churchwardens in reference to the church are of a limited and qualified nature. They are not entitled even to the custody of the keys of the church, the custody of which belongs to the minister. The church ornaments, the church furniture, and the framework of the pews in the church, are vested in the churchwardens; but they have only a right of access to the church in proper seasons: see *Ritchings* v. *Cordingley*. (1)

It is impossible to suppose that the Legislature by naming the churchwardens in this section of the Act thereby contemplated ousting the Ecclesiastical Court of its jurisdiction over the fabric

(1) Law Rep. 3 A. & E. 113.

1892

RECTOR, &c., OF ST. MARY-AT-HILL WITH ST. ANDREW HUBBARD *v.* PARISHIONERS OF SAME.

Dr. Tristram.

of the church, and vesting it in the churchwardens during possibly one of the most important epochs in the history of a church. It is incredible to suppose that the Legislature intended by this section to authorize churchwardens to enter a church and in their sole discretion to take down the pews, the reading-desk, communion rails, and other portions of the church, to the possible danger of the stability of the fabric, without being subject to any control or supervision in respect of acts ordered by them to be done in the church, or in respect of the removal of the remains or of the restoration of the church after their removal. The Court will decree a faculty to issue to the churchwardens of the united parishes as officers of the Ordinary, directing them to do what is required to be done by the Order in Council, and will direct provisoes to be inserted in the faculty for the safeguard of the fabric of the church and authorizing the families of persons buried in the vaults to remove the remains of their relatives to any consecrated burial-ground selected by them.

It appears by letters lodged in the registry, that some of Lord de Ramsey's ancestors are buried in the vaults, and that his lordship is desirous to remove them to a consecrated place of burial. A proviso will be inserted in the faculty to enable his lordship to do this, subject to an affidavit of facts being filed. Lord de Ramsey is also desirous of removing a monument in the church erected to some of his ancestors to another church. As the remains of his ancestors are about to be removed, the Court will be prepared to grant to his lordship a faculty for the removal of the monument without a citation, subject also to an affidavit being filed in support of the petition for the faculty. (1)

The only question that remains for the consideration of the Court relates to the costs incurred in relation to the removal of the remains.

It appears by documents brought into the registry that by certain feoffments, dated in and after the time of Charles I., considerable real estate and personal estate was vested in the

(1) The part of the judgment relating to the grant of a faculty for the removal of the monument to some of Lord de Ramsey's ancestors was not carried out, as Lord de Ramsey expressed a wish that the monument in question should remain in the church of St. Mary-at-Hill.

1892

RECTOR, &c., OF ST. MARY-AT-HILL WITH ST. ANDREW HUBBARD *v.* PARISHIONERS OF SAME.

Dr. Tristram.

churchwardens and other parishioners for the benefit of the church and parish, and that out of the rents and income of this property the church expenses were always paid, and the balance appropriated to other parochial uses, until the property was diverted from the parish by an order of the Charity Commissioners issued under the provisions of the City of London Parochial Charities Act, 1883. It appears that the average annual sum formerly appropriated for church expenses amounted to 600*l.*, and that this has been reduced by the award of the Charity Commissioners, made under the powers conferred upon them by their Acts, to an annual payment of 350*l.* for ordinary maintenance of the church and service, and of 95*l.* for repairs, including all extraordinary expenses, which sums the churchwardens stated in their evidence to be utterly inadequate for the purpose intended. In addition to this annual payment, a principal sum of 865*l.*, based on an estimate furnished to the commissioners by Mr. Christian, has been set aside by them for the purpose of putting the fabric in good structural repair.

It is at present difficult to form an estimate of the possible cost of the removal of the bodies from the church to the Norwood Cemetery. The churchwardens considered that it might cost from 1000*l.* to 2000*l.*, and it was submitted by Mr. Statham on their behalf that it would be most unjust to the parishioners to throw this burden upon the rates, and that in equity it ought to be met out of the parochial funds vested in the Charity Commissioners.

It occurs to the Court, that had Mr. Christian at the time of preparing his estimate for the guidance of the commissioners in making their award, been aware that a considerable further sum, in addition to the sum named by him, would shortly be required to make the church sanitarily safe, he would have felt it his duty to add this further sum to his estimate; for it is incredible to suppose that either Mr. Christian or the commissioners would have been content to make the church structurally safe, but to leave it sanitarily unsafe.

The parochial property has been divided into two portions, one portion, amounting to 865*l.* per annum, being treated as church or ecclesiastical property, and the other portion, amount-

1892

RECTOR, &c., OF ST. MARY-AT-HILL WITH ST. ANDREW HUBBARD v. PARISHIONERS OF SAME.

Dr. Tristram.

ing to 1331*l.* 7*s.* 8*d.* per annum, being treated as applicable to general purposes; and the balance of the annual sum set apart for ecclesiastical purposes, after providing for the annual payments awarded by the commissioners for the services of the church being 420*l.*, is to be placed annually at the disposal of the Ecclesiastical Commissioners.

I see by the scheme of the Charity Commissioners it is provided, that if within two years from the date of the scheme—and it is dated February, 1891—it shall be made to appear to the satisfaction of the commissioners that the sum set apart is not sufficient for the maintenance of the fabric, they may increase the amount to be allowed for these purposes. If the churchwardens, therefore, make a representation before February, 1893, to the Charity Commissioners, that there is a large sum required to make the church sanitarily safe in addition to the sum awarded to make it structurally safe, it is in the power of the commissioners to appropriate a further sum for this purpose.

Statham, stated that Lord de Ramsey would now prefer that the monument to members of his family should remain in the church, and that an entry should be made in the parish register that their remains had been removed. He also asked the Court to certify that the expenses of this faculty were incidental to carrying out the Order in Council made under the Act.

DR. TRISTRAM. The Court accedes to your application on both points.

Solicitor for petitioners: *H. J. Calder.*

C. F. J.

1892
July 30;
Aug. 1.

BONAPARTE *v.* BONAPARTE (Otherwise MEGONE).

Nullity—Domicil—Matrimonial Home—Scotch Divorce—English Marriage—Collusion—Fraudulent Misrepresentation.

A petition by the husband for divorce in this Court having been dismissed with costs against the petitioner, the co-respondent in the suit consulted a solicitor in Scotland with the view of commencing proceedings for obtaining a divorce in the Court of Session. The solicitor communicated with the petitioner, and ultimately, acting as the agent of all parties, commenced a suit for divorce in the Court of Session. The domicil of all the parties was English; but, in order to found jurisdiction, the respondent and co-respondent cohabited at Ayr, and an office was taken for the petitioner in Glasgow as a tea merchant; but no business was done there, and he was actually only in Scotland three times for a day and a night on each occasion. All possible steps were taken to conceal the real facts from the knowledge of the Court of Session. The co-respondent was described by a name which was not his own, neither he nor the respondent put in any answer to the suit, and the petitioner swore in his oath de calumnia that there was no collusion between the parties. All the expenses, including the petitioner's travelling expenses, were paid by the co-respondent.

The Court of Session having pronounced a decree of divorce, the respondent and co-respondent went through a ceremony of marriage at the Isle of Man:—

Held, on a petition to declare this marriage null and void, that the Court of Session had no jurisdiction to dissolve the first marriage, and that the second marriage was therefore invalid.

Petition for declaration of nullity of marriage.

The petitioner, Louis Clovis Bonaparte, prayed that a ceremony of marriage celebrated on May 30, 1888, between him and the respondent Rosalie Megone, described in the certificate as Rosalie Barlow, at the parish church of St. Thomas, Douglas, in the Isle of Man, might be declared null and void, on the ground that the said Rosalie Barlow, on December 20, 1884, being then a spinster, was lawfully married at St. Saviour's Church, South Hampstead, in the county of Middlesex, to Norfolk Bernard Megone, who was and is still living, and that a decree pronounced by the Court of Session in Scotland, purporting to be a decree of divorce between the said Norfolk Bernard Megone and Rosalie Megone, by reason of the adultery was invalid as having been procured by fraud, collusion, and misrepresentation, the Court of Session having no jurisdiction to pronounce a divorce, inasmuch as the

parties had no domicil or matrimonial home in Scotland. There was a further allegation in the petition, that by the law of Scotland a wife who is divorced on the ground of her adultery cannot contract a marriage with the man with whom she has been found guilty of committing such adultery.

The respondent in her answer, admitted the facts relating to her two marriages, but alleged that the domicil of herself and Megone was in Scotland at the time of the divorce, and that the Court of Session had therefore jurisdiction to pronounce a decree divorcing her from Mr. Megone.

The case was heard before Gorell Barnes, J., without a jury.

Inderwick, Q.C. (*Searle,* and *Bartley Dennis,* with him), for the petitioner.

Lane, Q.C. (*W. J. Dixon,* with him), for the respondent.

B. Deane, for Mr. Megone.

From the evidence given at the hearing it appeared that the respondent, then Rosalie Barlow, was married on December 24, 1884, to Mr. Norfolk Megone, and cohabited with him in London until September, 1885, when Megone presented a petition in this Court for divorce on the ground of his wife's adultery with Henry Osborne O'Hagan. This petition was dismissed by consent on November 9 before it came on for hearing; and on November 13 Mr. Megone presented another petition, in which he charged his wife with adultery with the present petitioner, then known as Louis Clavering Clovis. Mr. Clovis filed an answer denying the charge; but on February 8, 1886, he filed an affidavit charging collusion between Megone and O'Hagan; and on March 12, Clovis, by leave of this Court, filed an amended answer, in which he charged collusion, and alleged that he had eloped with Mrs. Megone at the instigation of O'Hagan, who had procured the dismissal of the former petition by the payment of 1000*l.* to Mr. Megone, and by an undertaking to settle 5000*l.* on Mrs. Megone. No further proceedings were taken in this petition until June 16, 1887, when it was again brought before the Court at the instance of Mrs. Megone. Neither the petitioner nor the co-respondent appeared, and the President (Lord Hannen) dismissed the petition, condemning the petitioner in the costs.

1892

BONAPARTE v. BONAPARTE.

In May, 1887, Mr. Clovis, who was a natural son of the late Prince Lucien Bonaparte, and who, having been legitimatized by him according to the French law shortly before his death, had assumed his name, and was now known as Louis Clovis Bonaparte, entered into communication with Mr. John Stuart Lang, a solicitor in Glasgow, with the view of instituting proceedings in the Scotch Court for a divorce between Mr. and Mrs. Megone. He and Mrs. Megone were at that time cohabiting at Ayr. In consequence of that communication, Mr. Lang, acting as the agent of Mr. Bonaparte and Mrs. Megone, wrote the following letter to Mr. Megone in London :—

"Glasgow, May 16, 1887.

"Dear Sir,—Mrs. Megone and Mr. Clovis have consulted me as to the action of divorce at your instance at present enrolled to come up before the Court, and the latter has instructed his solicitor in London to get the case dismissed at your instance, both parties paying their own costs. His solicitor telegraphs that this must be done in Court; but I shall be glad if you will arrange with your solicitor to have the matter withdrawn, either by lodging a joint minute, or by some other way which you can arrange, and so have the action dismissed without any publicity. Of course Mr. Clovis will pay his own costs, notwithstanding the terms of the decree, should the action be withdrawn in this way.

"In addition, after consultation, I have to propose that you shall immediately come to Scotland with the intention of founding a domicile here, and thus making yourself amenable to the jurisdiction of the Scottish Courts.

"My clients propose that after you have, by a forty days' stay here, domiciled yourself you should raise the action in the Scottish Courts. The respondent and co-respondent being domiciled here, you should have no difficulty in getting decree; for by coming to this country for the express purpose of founding for yourself a jurisdiction to raise the action, it can be supposed that you did so because of the expense to yourself being so much less, and because, the respondent being at present resident in this country, less expense would be incurred by you on her behalf. You do not require to remain here continuously during these forty days, so long as you make Scotland your head-quarters;

and should you put yourself in my hands, as Mrs. Megone and Mr. Clovis propose, the expenses of the action will be met by them. They will not defend, and we can arrange between us when you come north as to the proof you require to lead. You have, of course, to lead proof even although the case is undefended.

"Should you be uncertain in your mind as to the effect of such a domicile and jurisdiction, which Mrs. Megone and Mr. Clovis will not dispute, you can refer to the case of *Pitt* v. *Pitt* (1864), with cases cited therein and the remarks of the judges.

"This course would avoid the publicity which you are anxious to avoid by the case coming before the London Courts and getting into the English reports. But in order to be carried through soon, and before the Court rises in July for the autumn recess, you will require to begin your residence at once."

In reply to this letter Mr. Megone wrote:—

"London, 19th May, 1887.

"Dear Sir,—I am in receipt of your letter of the 16th instant. I am not at present in a position to discuss with you the legal bearings of the position; but it appears to me that the proceedings in London should be stopped without delay, and, with this view, I to-day called upon my solicitor, who surprised me by informing me that Mrs. Megone had taken another active step in the litigation by instructing her solicitors to obtain an order for me to give further security for costs to cover the costs of briefing counsel for the hearing of the case.

"If you will advise Mrs. Megone to give immediate instructions to her London solicitors to stay all proceedings so that the case when called on will be struck out for want of the appearance of any of the parties concerned, I shall be in a better position to judge of the proposition contained in your letter, and to let you know my views thereon."

A lengthened correspondence followed between the parties, in which the means of keeping the real facts from the knowledge of the Scotch Court, and avoiding publicity, were discussed, and in July, 1887, the petition in this Court having been dismissed as part of the arrangement, Mr. Lang took an office for Mr. Megone

1892

BONAPARTE v. BONAPARTE.

in West Nile Street, Glasgow, as a "tea merchant." No business was carried on there; but on July 9, which was Saturday, Megone came to Glasgow with a return ticket, and remained there until Sunday night, his expenses being paid by Mr. Lang on behalf of the petitioner. Immediately afterwards a suit for divorce was commenced in the Scotch Court; and on September 5 the first summons was served on the petitioner and respondent at the Central Hotel, Glasgow, where they had gone for the purpose of being served. In the summons Mr. Megone was described as "Norfolk Bernard Megone, tea merchant, Glasgow," and it alleged adultery with "Joseph Richards," "Joseph" being the confirmation name of Mr. Clovis Bonaparte, and "Richards" his mother's name. On September 11, Megone went a second time to Glasgow for a night, his expenses, amounting to 4*l.* 13*s.*, being again paid by Mr. Lang. On December 8 a second summons was served on the petitioner and respondent at 365, Sauchiehall Street, Glasgow, which described the pursuer in the same terms as the first, and alleged in the second paragraph of the condescendence that: "In April, 1886, the defender, without any reason, left the pursuer's house, and has remained away from him since. When she left she went to reside in Ayr, where she resided for some time, and thereafter she went to 365, Sauchiehall Street, Glasgow, where she presently resides. The pursuer has recently learned that the defender has led an adulterous life in Ayr and Glasgow with a man named Joseph Richards. The pursuer is unable to aver specific acts of adultery, further than that, particularly in the months of November and December, 1887, the defender committed adultery with the said Joseph Richards in the house 365, Sauchiehall Street, Glasgow, where they live as husband and wife."

On December 24, Megone went to Edinburgh, appeared before Lord Maclaren, and was sworn and examined de calumnia. He deposed that the facts stated in his condescendence were true, and further swore "that there has been no concert or collusion between him and the defender . . . . nor does he know, believe, or suspect that there has been any concert or agreement between any other person on his behalf and the defender or any other person on her behalf with the view or for the purpose of obtaining

such divorce. All which is truth, as the deponent shall answer to God."

Shortly after this Megone went to Canada; and on his return in March, 1888, the suit came on for hearing before Lord Maclaren. Megone was examined, and other witnesses on his behalf; but neither the petitioner nor the respondent appeared, although they attended in court to be identified, and a decree of divorce was pronounced. Subsequently Megone contracted another marriage in Scotland; and on May 30, 1888, Mr. Bonaparte and Mrs. Megone went through the ceremony of marriage at the parish church of Douglas, Isle of Man, which it was now sought to have declared null and void.

Mr. Megone was examined, and stated that London was, and always had been, his home, and that he had only been to Glasgow twice for a day and a night, and to Edinburgh once. Mr. Bonaparte was also examined as to his domicil, which he said was English. He was born in France, but was brought over to this country when three weeks old, and had always remained here. The respondent in her evidence stated, that though she knew that proceedings were being taken in Scotland to dissolve her marriage with Megone, she was not aware of the details, and had never any idea that there would be a difficulty in procuring a decree. She was under the impression that her residence in Scotland would make it all right. Mr. Lang in his evidence stated, that all his instructions and payments came from Mr. Bonaparte, and that he had no communication with the respondent.

Mr. Robert Campbell, an advocate of the Scotch Bar, stated, that in order to found jurisdiction in the Scotch Courts in a suit for divorce, it is necessary that the husband should be really domiciled in Scotland. Casual visits such as those described as having been paid by Mr. Megone would have no effect in founding jurisdiction. After hearing the evidence given, it was clear, in his opinion, that the Scotch Court had no jurisdiction, and that its decree was a nullity. In cross-examination, Mr. Campbell said that there was a period when the Scotch Courts took a rather loose view of jurisdiction, but that was abandoned after the decision of the House of Lords in *Pitt* v. *Pitt*. (1) There

(1) 4 Macq. 627.

1892

BONAPARTE v. BONAPARTE.

were two or three cases in which it was held that a forty days' residence was sufficient; but the Courts now held that it must be a bonâ fide true domicil.

[He referred also to *Carswell* v. *Carswell* (1), *Stavert* v. *Stavert* (2), and *Watts* v. *Watts*. (3)]

Lane, Q.C., for the respondent. Although Mr. and Mrs. Megone may not have had a Scotch domicil at the time of the divorce proceedings, and although the Scotch Court might have refused to pronounce a decree if all the facts had been before it, the petitioner in this case is estopped from questioning the validity of the decree, inasmuch as it was brought about by his own fraud and misrepresentation. A fraud has been perpetrated by the petitioner, for the respondent knew nothing about what was going on, and he asks now that he shall be allowed to take advantage of his own wrong. The respondent was not a consenting party to the fraud; she entered into the marriage with the petitioner believing that the impediment of her first marriage had been legally removed. She is an innocent party; but the suit of the petitioner is contrary to the rule that the Court will not assist a man who does not come before it with clean hands.

Inderwick, Q.C., for the petitioner. It is clearly established that Megone had no domicil in Scotland at the time when the proceedings were commenced, and he had only been thrice in the country for a day and a night at a time when the decree was pronounced. The Scotch Courts, therefore, had no jurisdiction to pronounce it: *Shaw* v. *Gould* (4) and *Lawford* v. *Davies*. (5) As to the principle that a man may not take advantage of his own wrong, the Court has entertained suits and pronounced decrees invalidating marriages which had been contracted by persons who knew perfectly well at the time that they were invalid: *Miles* v. *Chilton* (6); *Andrews* v. *Ross* (7); *Lord Hawke* v. *Corri*. (8)

GORELL BARNES, J., after reviewing the facts and the correspondence in detail, said:—Under these circumstances the

(1) 8 Court Sess. Cas. 4th Series (Rettie), 901.
(2) 9 Court Sess. Cas. 4th Series (Rettie), 519.
(3) 12 Court Sess. Cas. 4th Series (Rettie), 894.
(4) Law Rep. 3 E. & I. App. 55.
(5) 4 P. D. 61.
(6) 1 Rob. 684; 6 N. of C. 636.
(7) 14 P. D. 15.
(8) 2 Hagg. Cons. 280.

1892

BONAPARTE v. BONAPARTE.

Gorell Barnes, J.

petitioner, Mr. Clovis Bonaparte, claims to have the marriage between himself and the respondent declared null and void, on the ground that as Megone had no domicil or matrimonial home in Scotland the Court of Session in Scotland had no jurisdiction to dissolve the present marriage between him and his wife. The respondent admits the two marriages, but alleges that Megone had in fact a Scotch domicil, and that the Court of Session had therefore power to pronounce a decree of divorce. Now, Mr. Campbell, the member of the Scotch bar who was examined here as to the law of Scotland, has stated that in order to found jurisdiction for divorce in Scotland it is necessary that the husband should be really domiciled, and that casual residence had no effect in founding jurisdiction, and that on the evidence in this case, which he had heard, he was of opinion that the Court had no jurisdiction to entertain the case and to grant a decree of divorce. Mr. Campbell referred to the cases of *Pitt* v. *Pitt* (1); *Stavert* v. *Stavert* (2); *Carswell* v. *Carswell* (3); and *Watts* v. *Watts*. (4)

It is clear that in the present case a fraud was perpetrated on the Scottish Court by allowing it to act on the assumption that the pursuer was domiciled in Scotland, and that there was no collusion. As a matter of fact the pursuer had no domicil or matrimonial home in Scotland. He only came to Scotland three times, remaining for a day and night each time; and the parties, as appears from the facts stated, were guilty of collusion in concealing this from the Court. Indeed, Mr. Lane was unable to maintain that the Court had jurisdiction. In *Shaw* v. *Gould* (5), where a Scotch divorce was in question, Lord Westbury said: "The first essential for the validity of a foreign decree is that it should be pronounced by a court of competent jurisdiction between parties bonâ fide subject to that jurisdiction. . . . It is perfectly competent to the Courts in Scotland to fix a certain amount of residence as a condition for the exercise of its jurisdiction, and if that condition be fulfilled, it may proceed to

(1) 4 Macq. 627.

(2) 9 Court Sess. Cas. 4th Series (Rettie), 519.

(3) 8 Court Sess. Cas. 4th Series (Rettie), 901.

(4) 12 Court Sess. Cas. 4th Series (Rettie), 894.

(5) Law Rep. 3 E. & I. App. p. 81.

1892

BONAPARTE v. BONAPARTE.

Gorell Barnes, J.

pronounce a judgment that will be binding within its own borders; but that judgment cannot claim extra-territorial authority unless it be pronounced in accordance with the rules of international public law." And at p. 82, Lord Westbury says: "No nation can be required to admit that its domiciled subjects may lawfully resort to another country for the purpose of evading the laws under which they live. When they return to the country of their domicile, bringing back with them a foreign judgment so obtained, the tribunals of the domicile are entitled or even bound to reject such judgment as having no extra-territorial force or validity. They are entitled to reject it if pronounced by a tribunal not having competent jurisdiction, and they are bound to reject it if it be an invasion of their own laws and polity." It follows, therefore, that the Scotch Court had no jurisdiction to pronounce a decree in this collusive suit, and the decree which it has pronounced is null and void. The marriage between Mr. and Mrs. Megone was not dissolved, and Mrs. Megone was a married woman with a husband still living when she went through a ceremony of marriage with the present petitioner. I may add, that to concede to the Scotch Courts such a jurisdiction would enable English residents who had failed in obtaining decrees in England—as was the case here—to proceed to Scotland, and by collusion with the other parties to obtain a decree there, where the previous proceedings were unknown to the judges.

Mr. Lane, however, relied very forcibly upon a second point—that this Court would not pronounce a decree of nullity in favour of a petitioner who had been guilty of such misconduct as the petitioner in this case, and he contended that the respondent had not been guilty of any misconduct sufficient to convict her of collusion. On that point I cannot do better than refer to the two cases which have been cited in argument: *Miles* v. *Chilton* (1) and *Andrews* v. *Ross*. (2) In both these cases—in which relief was sought by parties who had contracted marriages which they knew were invalid—it was held that the contract of marriage must be regarded in a different light and on different principles from other contracts; and, as was said by Dr. Lushington,

(1) 1 Rob. 684; 6 N. of C. 636. (2) 14 P. D. 15.

1892

BONAPARTE v. BONAPARTE.

Gorell Barnes, J.

there are very good reasons why the Court should exercise its jurisdiction to set them aside, not merely as relating to the parties themselves and their status, but also as to the illegitimacy of children. I hardly think it can be contended by the respondent's counsel that she knew nothing about the matter. She knew all about the failure of the English suit, and she knew that the Scotch suit was being brought with the consent of all parties, although she may not have known the extent to which the proceedings were fraudulent. I am bound by the decision to which I have referred. The petitioner has been called to prove an English domicil; and it is clear that all the parties were domiciled in England at all the material times. In the case of *Lawford* v. *Davies* (1), which was the case of a marriage in Scotland, the parties were domiciled in England, and Lord Hannen held that, as they had not lived in Scotland long enough to have obtained a Scotch domicil, the marriage was invalid. I must, therefore, declare this marriage to be null and void, and, under the circumstances, I think the petitioner should pay all the costs.

Solicitors for the petitioner: *Newson & Co.*
Solicitor for the respondent: *John Fawcett.*
Solicitors for Mr. Megone: *Hepworth & Webb.*

W. L.

[DIVISIONAL COURT.]

1892
June 3.

THE NIFA.

Admiralty—Charterparty—Printed and Written Clauses—Cargo to be "taken from alongside the ship at merchant's risk and expense"—Cargo to be discharged "according to the custom" of Port—Exclusion of Evidence of Custom throwing Expense on Shipowner.

By charterparty between the plaintiffs, shipowners, and the defendants, charterers, it was agreed that the plaintiffs' steamer should load a cargo of deals for the defendants: "The cargo to be brought to and taken from alongside the ship at merchant's risk and expense, where she can lie always afloat and safe" . . . . "and being so loaded shall therewith proceed to Yarmouth, Norfolk, or so near thereunto as she may safely get, and deliver the same always afloat . . . ."

The following clause was in writing: "The cargo to be supplied as fast as

(1) 4 P. D. 61.

1892

THE NIFA.

steamer can load and stow same, and discharged as fast as steamer can deliver and according to the custom of the respective ports . . . ."

On arrival at Great Yarmouth the vessel was moored fifteen feet from the quay edge, which was as near to the port as the vessel could lie always afloat, and in consequence 9*d.* per standard extra cost was incurred in the discharge.

In an action by the plaintiffs to recover this amount, the judge of the Yarmouth county court gave judgment for the defendants, holding, on the authority of *Scrutton* v. *Childs* (3 Asp. Mar. L. C. 373), that the written prevailed over the printed clause, and he admitted evidence of a custom that the shipowner must deliver on the quay; and, therefore, bear the extra cost of the discharge between the ship's rail and the quay. He also admitted telegrams and letters alleged to indicate the intention of the parties as to the construction of the contract.

The plaintiffs appealed:—

Held, by the Divisional Court, that judgment must be reversed on the ground that the evidence as to the custom was improperly admitted, as the two clauses were not inconsistent, the clause as to the cargo being "taken from alongside the ship at merchant's risk and expense," dealing with the cost of the discharge, whilst the clause as to delivery "according to the custom," dealt with the time and mode of the discharge:

Held, also, that the correspondence between the parties was inadmissible, as there was no ambiguity in the contract.

APPEAL by plaintiffs, the owners of the steamship *Nifa*, in an action for damages for breach of charterparty, against a decision of the judge of the county court of Norfolk, holden at Great Yarmouth, in favour of the defendants, the charterers of the vessel.

The facts—so far as material on the question as to the admission of evidence of a custom for the shipowner to deliver on the quay, and, therefore, to bear any expense connected with the discharge of cargo between the ship's rail and the quay—were shortly as follows:—

By charterparty, dated December 1, 1890, and made between the plaintiffs, Nielsen, Andersen & Co., managing owners of the *Nifa*, and the defendants, Palgrave Brown & Co., timber merchants, the steamship was chartered to load a cargo of deals at Gothenburg, Sweden. "The cargo to be brought to and taken from alongside the ship at merchant's risk and expense, where she can lie always afloat and safe," . . . . "and being so loaded shall therewith proceed to Yarmouth, Norfolk, or so near thereunto as she may safely get, and deliver the same always afloat." Then after the usual clauses as to payment of freight, and ex-

cepted perils, the following was inserted in writing: "The cargo to be supplied as fast as steamer can load and stow same, and discharged as fast as steamer can deliver, and according to the custom of the respective ports . . . ."

The *Nifa* arrived at Great Yarmouth on December 22, 1890, and was moored fifteen feet from the quay edge, which was the nearest position the ship could reach "always afloat." On the same day the defendants wrote to the master: "We are ready to receive your cargo on the wharf where your vessel is moored. If you wish we can find men to discharge same in accordance with terms of charterparty for 2*s.* 6*d.* per standard. But if, however, you prefer employing men yourself, please be careful to arrange with them to discharge the cargo according to the custom of the port as specified in charterparty, so that there may be no delay, as we can only receive it so . . . ."

Several communications passed between the plaintiffs and defendants, and ultimately the question of liability for the cost of delivery on the quay was left open for subsequent decision.

To enable the cargo to be discharged it was necessary to have a staging, and the defendants pointed out the place, about the length of the ship, some thirty feet deep and about fifteen to twenty feet from the edge of the quay, on which the cargo was to be landed. The discharge, which commenced the next day, was effected by one gang of men discharging from the ship's hold over the rail, another gang receiving the cargo from the ship's side, carrying it across the quay, and stacking it on the land indicated.

There was not space to place the cargo on the land without stacking it. As the discharge took place, the stack got higher and higher, and planks had to be placed to make a way to the top, so that the stack might be kept level by carrying timber to the far side of the stack. The cost of putting the cargo over the ship's rail was 1*s.* 9*d.* per standard, and a further sum of 9*d.* per standard for taking it from the ship's rail and stacking it. For this latter sum the plaintiffs brought an action against the defendants in the county court of Northumberland, holden at Newcastle, the particulars of the claim being:—

"To extra cost of discharging 183 standards of wood goods at

1892

THE NIFA.

Yarmouth by reason of your refusal to take the same from alongside the ship.

"183 standards at 9*d.* per standard, 6*l.* 17*s.* 3*d.*"

The action was transferred from Newcastle to the Great Yarmouth County Court, and at the trial a custom was set up by the defendants for the ship to deliver on to the quay. The learned county court judge, following *Scrutton* v. *Childs* (1), held that the written clause, referring to the custom, prevailed over the printed clause as to the expense, and admitted evidence of the custom. He also allowed certain telegrams and letters to be put in alleged to indicate the intention of the parties as to the construction to be put upon the contract, and in the result gave judgment for the defendants.

The plaintiffs appealed.

J. P. Aspinall, for the appellants (plaintiffs). The learned judge in the Court below was wrong in admitting evidence of a custom which would throw the expense of delivering on to the quay upon the shipowner. Even if such evidence were admissible, it was not necessary for the purposes of the case, for the written words "according to the custom of the respective ports" only apply to the time and manner of the discharge, and do not control or override the previous printed words that the cargo is to be "taken from alongside the ship at merchant's risk and expense."

[A. L. SMITH, J. The clause as to expense refers to discharging as well as loading, although it is in the wrong place in the charterparty.]

In *Scrutton* v. *Childs* (1) it was, no doubt, held that the written words prevailed over the printed, but that case was, in effect, overruled by the Court of Appeal in *Holman* v. *Wade* (2), where evidence of custom was attempted to be brought in under the words "at merchant's risk and expense as customary," but rejected by the Court on the ground of inconsistency with the contract.

So in *Hayton* v. *Irwin* (3), where the vessel was to deliver cargo at Hamburg "or so near thereto as she could safely get"

(1) 3 Asp. Mar. L. C. 373. (2) *Times*, May 11, 1877.
(3) 5 C. P. D. 130.

and discharge "as customary, the cargo to be brought to and taken from alongside the ship at merchant's risk and expense," the shipowner was held not bound by an alleged custom to deliver the entire cargo at Hamburg, and, the custom being inconsistent with the contract, the shipowner recovered from the charterer the amount paid for lighters for a portion of the cargo discharged at Stade, as being the nearest place to Hamburg to which the vessel could safely get with her then draught of water. In *Lishman* v. *Christie* (1), the shipper's agent had persuaded the master that the shipowner was responsible by the custom of the port for cargo lost on its way to the ship, and the master signed clean bills of lading, the charterparty providing that the bill of lading should be conclusive evidence against the shipowner as to the quantity shipped, and in the Court of Appeal the contract was held binding, Lord Esher stating that the evidence of the custom given in the Court below was inadmissible.

Poyser, for the respondents (defendants). In the cases cited on behalf of the plaintiffs, the clauses were in print, and, therefore, general expressions had to give way to express terms, but here the printed clause, as to the expenses, is inconsistent with the written clause as to the steamer delivering according to the custom of the port, and, the written prevailing over the printed clause, evidence of the custom was rightly admitted. As the whole point was whether the shipowner was bound to deliver on the quay, the telegrams and letters put in shewed what the custom relied on was, and they were properly allowed to be read in order to shew definitely what the clauses meant: *The Curfew*. (2) The intention of the parties to this contract is indicated by the clause inserted in writing and as this prevails: *Scrutton* v. *Childs* (3), the expenses in question, are, by the custom of the port, thrown on the plaintiffs, and their action for this amount therefore failed.

THE PRESIDENT (SIR FRANCIS JEUNE). In this case the only question which has to be decided is whether evidence can be admitted of a custom, under the circumstances.

(1) 19 Q. B. D. 333. (2) [1891] P. 131.
(3) 3 Asp. Mar. L. C. 373.

1892

THE NIFA.

The President.

The learned judge of the Court below has admitted the evidence, and he has held as to its result. We need not, I think, consider the question as to what the effect of the evidence of the custom is, because, before we enter into it, there is a question whether evidence of custom is admissible.

In the charterparty there are two sets of words which have to be put together for the purpose of seeing what it really means. The first words are: "The cargo to be brought to and taken from alongside the ship at merchant's risk and expense"; and then, later on, "the cargo to be supplied as fast as steamer can load and stow same, and discharged as fast as steamer can deliver, and according to the custom of the respective ports."

It is said that, according to the custom of the port in question, it was not the merchant who had to pay for taking the timber to a place some little distance from the waterside; but that expense was to be borne by the ship. Reliance is placed upon the case of *Scrutton* v. *Childs*. (1) There, as here, part of the material language was in print and part in writing, and the question was argued which was to prevail. Mellor, J., said, "the parties appear to have forgotten to strike out the printed words which contradicted the written ones, and the question for us to decide is, which is to prevail of two contradictories"; and it was held that of the two the written words were to be preferred.

But the question appears to me to be whether there is a contradiction between the two? if not, we need not strike out one or the other. In the case of *Holman* v. *Wade* (2), where the cargo was to be "taken from alongside at merchant's risk and expense as customary," an attempt was made to make the words "as customary" override "at merchant's risk," but it failed altogether. Then, in a later case of *Hayton* v. *Irwin* (3), very much the same point arose, and there the evidence of custom was not admitted. But I think a stronger authority is to be found in the last case decided, which is *Lishman* v. *Christie*. (4) The provisions there were that "the ship should load as customary a full cargo of fir" and that "the cargo should be brought to and taken from alongside the ship at merchant's risk and expense,"

(1) 3 Asp. Mar. L. C. 373.
(2) *Times*, May 11, 1877.
(3) 5 C. P. D. 130.
(4) 19 Q. B. D. 333.

and Lord Esher expressed his opinion, of the very greatest weight, that custom could not be admitted to vary evidence of the provision as to the discharge of the cargo.

I see no difficulty in this case in reading the whole of the contract without any part of it being contradictory with another.

The first part is clear that the cargo is "to be brought to and taken from alongside the ship at merchant's risk and expense," and then the cargo is "to be supplied as fast as steamer can load and stow same, and discharged as fast as steamer can deliver, and according to the custom of the respective ports." It appears to me that you may very well say that the words "according to the custom" in the latter clause do not modify "at the merchant's risk and expense," but may control the time and manner in which the cargo is to be loaded, stowed, and discharged. That I think, meets the point that is raised, that in *Scrutton* v. *Childs* (1) there were some words written and some printed. I am not going to say that if there be a contradiction between the two that rule may not apply; but if there is no contradiction, the rule does not apply.

The case was further rested upon some letters which it was asked should be admitted for the purpose of controlling or varying these words, and the *Curfew* (2) was relied upon. I can see no difficulty. In the *Curfew* (2), evidence was let in to shew where there was the term "always afloat" (which might be ambiguous) what was really meant by it. But here I see no ambiguity which would justify the Court in letting in evidence of what passed between the parties to control a contract which they eventually signed. Therefore evidence as to custom was not admissible; and that being so, the judgment of the Court below must be reversed.

A. L. SMITH, J. This is an action brought by a shipowner against a goods owner to recover the sum of 6*l.* 17*s.* 3*d.*, which the plaintiff had to pay to unload timber from the rail of his ship to quay; and he says that by the charter it was not for him, but for the goods owner to pay this expense. This is the point in dispute.

(1) 3 Asp. Mar. L. C. 373. (2) [1891] P. 131.

1892

THE NIFA.

A. L. Smith, J.

Speaking for myself, it does seem to be a very clear case. First of all, you must read the charter. I protest against having letters and telegrams put in when a written contract has been come to between the parties. When letters and telegrams are let in, in nine cases out of ten, you see only that persons holding different views are disagreeing till they come to the written contract, and what is more they are not evidence.

Now, by the charter, who is to pay for taking goods from ship's rail to quay? The cargo is "to be brought to and taken from alongside the ship at merchant's risk and expense." That is clear. The merchants are to pay for it. The shipowner was to put the goods on the ship's rail, and the expense from the rail to the quay the merchants were to pay. Then, by the charter, the cargo is "to be supplied as fast as steamer can load and stow same, and discharged as fast as steamer can deliver, and according to the custom of the respective ports." How is this to be read? It seems to me clear that this was a cargo to be supplied to the ship at merchant's risk and expense as fast as steamer could load and stow same, and to be discharged from the ship at merchant's risk and expense as fast as steamer could deliver same. But I am asked to strike out the words "at merchant's risk and expense." It is said you must do so, because there are the words in writing, "and according to the custom of the respective ports." I read those words as meaning the mode of loading or unloading, or it may be as to where the goods are to be delivered; but that does not contradict that part of the contract which is staring one in the face, namely, that the taking to and from ship's rail is at merchant's expense. I say, in my view, this is a clear case.

Now, I come to the authorities. In *Scrutton* v. *Childs* (1) it does not seem that I took the right point. I was rather arguing whether the written part was to control the printed part. The point I should have taken, which has been taken in all the cases since, is that the writing is not contradictory. You have got "taking to and from ship's rail" is to be at merchant's expense. To be loaded and unloaded as customary does not contradict it. It means that the loading and unloading are to be according to the custom of the port, but not as regards the expenses to be borne

(1) 3 Asp. Mar. L. C. 373.

1892

THE NIFA.

I do not know whether *Scrutton* v. *Childs* (1) has been expressly in so many words overruled; but my opinion is that it cannot stand after *Holman* v. *Wade* (2), and *Hayton* v. *Irwin*. (3)

In my judgment, the evidence of custom was not admissible for the purpose for which it was wanted.

Appeal allowed.

Solicitors for appellants (plaintiffs): *Thomas Cooper & Co., for Lietch Dodd, Bramwell & Bell, Newcastle-upon-Tyne.*

Solicitors for respondents (defendants): *Dubois Reid & Williams, for Diver & Preston, Great Yarmouth.*

T. L. M.

[IN THE COURT OF APPEAL.]

C. A.

1892

July 26.

THE SCHWAN—THE ALBANO.

Admiralty—Collision—Limitation of Liability—Wrong Manœuvre not Corrected—Damage "Arising on Distinct Occasions"—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *s.* 506—*Merchant Shipping Act Amendment Act*, 1862 (25 & 26 *Vict. c.* 63), *s.* 54—*Inevitable Accident.*

By reason of the improper navigation of the steamship *Schwan*, in starboarding across the bows of the steamship *Albano*, the latter vessel sustained damage by coming into collision with the *M.* at anchor, and, by reason of the *Schwan* continuing under a starboard helm, that vessel came into collision with, and sank, the *D.* at anchor.

In an action by the owners of the *D.* against the *Schwan*, the latter vessel was found to blame. Her owners thereupon instituted a limitation suit, and obtained a decree under s. 54 of the Merchant Shipping Act Amendment Act, 1862, limiting their liability to 8*l.* per ton for damage caused by the improper navigation of the *Schwan* on the occasion of the collision between that vessel and the *D.*

In an action, by the owners of the *M.*, against the *Albano*, it was held by the Court of Appeal that the collision was an inevitable accident. By Lord Esher, M.R., because it had been shewn that, owing to the wrongful starboarding of the *Schwan*, something happened over which those in charge of the *Albano* had no control, and the effect of which could not be avoided by the "greatest" care and skill. By Fry and Lopes, L.JJ., because the accident, being one which those in charge of the *Albano* could not possibly prevent by the exercise of "ordinary" care, caution, and maritime skill, it was inevitable within the definition in *The Marpesia* (Law Rep. 4 P. C. 212).

In an action by the owners of the *Albano* against the *Schwan* for the

(1) 3 Asp. Mar. L. C. 373. (2) *Times*, May 11, 1877.
(3) 5 C. P. D. 130.

C. A. 1892

THE SCHWAN. THE ALBANO.

damage caused by the collision between the *Albano* and the *M.*, the owners of the *Schwan* (in consequence of the above decision of the Court of Appeal) admitted that the damage was caused by the improper navigation of the *Schwan*, but contended that the action was barred, as there was only one act of improper navigation, viz., the original starboarding, and no damage "arising on distinct occasions" within the meaning of s. 506 of the Merchant Shipping Act, 1854, so that the owners of the *Albano* must come in and claim against the fund paid into Court under the decree limiting their liability, or, in the alternative, that, if there were two acts of improper navigation, then the owners of the *Schwan* were exempt from liability, on the ground that the second act of improper navigation—viz., continuing under a starboard helm—was solely the fault of the pilot who was in charge by compulsion of law:—

Held, by the Court of Appeal—affirming the decision of the President—that (1.) the onus was upon the owners of the *Schwan* to shew that it was the same act of improper navigation, but there was time and opportunity to correct the wrongful starboarding, and, by the use of ordinary care and skill, to avoid the collision with the *D.* Therefore, the damage to the *D.* caused by the *Schwan* continuing under a starboard helm, arose on a "distinct occasion" from the act of improper navigation on the part of the *Schwan* in starboarding across the bows of the *Albano*; and (2.) that the burden of proof was upon the *Schwan* to shew that the fault was that of the pilot alone; but the evidence established that, from want of efficient look-out, the pilot was not warned in time to enable him, by correcting the wrongful starboarding, to avoid the collision with the *D.* Therefore, the owners of the *Schwan* were liable for the damage sued for, by the owners of the *Albano*, to the same extent as if no other damage had arisen.

APPEAL by defendants, the owners of the steamship *Schwan*, in an action of damage by collision, against so much of the decision of the President (Sir Francis Jeune), in favour of the plaintiffs, the owners of the steamship *Albano*, as pronounced that the damage occasioned by a collision between the *Albano* and another vessel, caused by the improper navigation of the *Schwan*, arose on a distinct occasion from the damage occasioned by a collision between the steamship *Schwan* and another vessel, in respect of which latter damage the owners of the *Schwan* had limited their liability.

The facts—so far as material—were as follows:—

On February 8, 1891, about 9 P.M., the defendants' steamship *Schwan*—of 1011 tons register, 500 horse-power, a crew of twenty-one hands, a general cargo and twelve passengers, from Bremerhaven to London, in charge of a compulsory pilot—was proceeding up the River Thames and had rounded into Lower Hope Reach. The weather was fine and clear, but dark, the wind light from the

C. A. 1892

THE SCHWAN. THE ALBANO.

eastward, and the tide nearly half-flood of the force of two to three knots. The Reach was very crowded with vessels, and the *Schwan*, making about six knots, had, shortly before, overtaken, and passed, on the starboard side, the plaintiffs' steamship *Albano* of 691 tons register, with a crew of twenty-one hands, a general cargo, and eleven passengers, from Christiania to London.

The *Albano* was heading up about mid-channel, with her engines going slow, and making rather more than three knots over the ground, when those on board her observed that the *Schwan*, which was about three lengths ahead, and a little on the starboard bow of the *Albano*, was coming off rapidly to port, and across the bows of the *Albano*, apparently under a hard-a-starboard helm. To clear the *Schwan* the helm of the *Albano* was put hard-a-port, and her engines full speed astern; but the riding light of the steamship *Obedient* was then observed on her starboard bow, and the helm of the *Albano* was thereupon put hard-a-starboard. Before, however, the *Albano* could gather sufficient sternway, she was carried by the tide athwart the bows of the steamship *Meggie*, at anchor off Lower Hope Point, on the starboard quarter of the *Obedient*, with the result that the *Meggie* sustained great damage, and the *Albano* had to be beached to avoid sinking.

The starboarding of the *Schwan* had been ordered by her pilot to clear the *Obedient*, and then the light of the steamship *Delambre*, at anchor to the south of mid-channel, was seen (and reported to the pilot by those on board the *Schwan*) about 250 yards distant, and bearing ahead, but on the starboard bow withal. The helm of the *Schwan* was put hard-a-starboard and her engines stopped and reversed full speed; but before the way could be taken off her, the stem of the *Schwan* struck the port side of the *Delambre*, in the way of the forerigging, doing that vessel so much damage that she almost immediately sank.

The owners of the *Delambre* commenced an action against the *Schwan*, and the owners of the latter admitted that the navigation of their vessel could not be justified; but alleged that the fault was that of the pilot alone.

On March 21, the President (Sir Charles Butt), pronounced

C. A. 1892

THE SCHWAN. THE ALBANO.

the *Schwan* to blame for the collision, and held that it was not the fault of the pilot alone, as the look-out should have warned him earlier of the light of the *Delambre*.

The owners of the *Schwan* thereupon instituted an action for limitation of liability, and on May 13 obtained a decree pronouncing "that in respect of loss or damage to ships, goods, merchandise, or other things, caused by reason of the improper navigation of the *Schwan* on the occasion of the collision between that vessel and the steamship *Delambre* . . . . the owners of the *Schwan* are answerable in damages to an amount not exceeding 9855*l.* 7*s.* 3*d.*, such sum being at the rate of 8*l.* for each ton of registered tonnage of the said steamship . . . ."

In respect of the damage to the *Meggie* due to the collision between the *Albano* and the *Meggie*, the owners of the *Meggie* brought an action against the *Albano*, which was tried, on June 19, by the President (Sir Charles Butt), assisted by two of the Elder Brethren of the Trinity House.

The Elder Brethren differed in opinion on the nautical questions submitted to them, one of them being of opinion that the master of the *Albano* committed an error of judgment amounting to negligence, but the learned judge acted on the advice of the other Elder Brother, and in the course of delivering judgment on June 29 said:—

"Rightly or wrongly, I have had a strong feeling that the view which I found Captain Burne had taken was the right one. I think that the real cause of this collision was the most improper navigation of the *Schwan*, putting the captain of the *Albano* suddenly in a position of great danger and difficulty, and that there was no negligence in his not having observed particularly the lights of these vessels at anchor before, because they were not in his way; and that although, as is said, porting and hard-a-porting and continuing under a port helm would probably have avoided a collision, and it was probably an error of judgment not so to have proceeded, yet it was a manœuvre on the spur of the moment, done under the man's best judgment formed on the spur of the moment, which is entirely excusable and cannot be held to be negligence."

The learned judge gave judgment for the defendants, the owners of the *Albano*, with costs.

The owners of the *Albano* then brought an action against the *Schwan* for the damage caused to the *Albano* by the collision with the *Meggie*, to which the owners of the *Schwan* put in a defence to the effect that the collision between the *Albano* and the *Meggie* was due to the negligence of the *Albano*, and by paragraph 2 alleged :—

"Alternatively the defendants say that if the said collision with the *Meggie* was attributable to the action of the *Schwan* in the statement of claim mentioned, and was so caused as to entitle the plaintiffs to recover the damages occasioned thereby in an action against the *Schwan*, the said collision and damages were caused by the improper navigation of the *Schwan*, on an occasion on which there was also a collision between the *Schwan* and the steamship *Delambre*, and by the same improper navigation as occasioned such last-mentioned collision, and that by a judgment of this Court in an action 1891 N. No. 517, Fo. 157, brought by the defendants against the owners of the steamship *Delambre* and others, the liability of the defendants was limited to 8*l.* per ton of the gross tonnage of the *Schwan*, amounting to the sum of 9855*l.* 7*s.* 3*d.* in respect of the damage to ships goods, &c., caused by the improper navigation of the *Schwan* on the said occasion, and in accordance with such judgment the defendants have paid into Court in the said action the said sum of 9855*l.* 7*s.* 3*d.* with interest, and have inserted advertisements intimating to all persons having claims to come in and enter their claims on or before the 13th day of August on pain of being excluded from sharing in the said amount, and that of the premises the plaintiffs had due notice before the commencement of this action, and the defendants say that by reason of the premises the plaintiffs are barred from claiming or recovering in this action, and the plaintiffs' claim is against the said sum of 9855*l.* 7*s.* 3*d.* in the said action 1891 N. No. 517, Fo. 157, and the defendants are not further liable."

As to this alternative defence, the plaintiffs by their reply said :—

"As to paragraph 2 of the defence the plaintiffs join issue and

C. A. 1892

THE SCHWAN. THE ALBANO.

say that the damage sued for in this action was occasioned by the improper and negligent navigation of the *Schwan* by the defendants or their servants on a distinct occasion from that in respect of which her owners have limited their liability in the action 1891 N. No. 517, Fo. 157, referred to in the said paragraph."

On November 12 this action came on for trial before the President (Sir Charles Butt), assisted by two of the Elder Brethren of the Trinity House; but, by arrangement, the question as to the collision between the *Albano* and the *Meggie* having been caused by the act of the *Schwan* was left open to abide the decision of the Court of Appeal.

Sir Charles Hall, Q.C., and *F. W. Raikes*, for the plaintiffs, the owners of the *Albano*.

Sir Walter Phillimore, and *J. P. Aspinall*, for the defendants, the owners of the *Schwan*.

It was contended for the defendants, upon whom the onus of proof lay, that the collision with the *Delambre* was a consequence of the wrongful navigation of the *Schwan* in originally starboarding to avoid collision with the *Obedient*, and therefore the collisions between the *Albano* and the *Meggie*, and between the *Schwan* and the *Delambre*, both arose out of the same improper navigation of the *Schwan*. It was contended for the plaintiffs, the owners of the *Albano*, that the damage for which they were suing was occasioned by the improper navigation of the *Schwan* on a distinct occasion within the meaning of s. 506 of the Merchant Shipping Act, 1854 (1); that is, that there was time and opportunity, if the pilot, master, and crew had exercised due care and skill, to avoid collision with the *Delambre* by promptly porting, and therefore the owners of the *Schwan* could not set up against the owners of the *Albano*, the decree in the limitation suit obtained, under s. 54 of the Merchant Shipping Act Amendment

(1) 17 & 18 Vict. c. 104, s. 506: "The owner of every sea-going ship or share therein shall be liable in respect of every such loss of life, personal injury, loss of or damage to goods as aforesaid arising on distinct occasions to the same extent as if no other loss, injury or damage had arisen."

Act, 1862 (1), in respect of the damage occasioned by the collision between the *Schwan* and the *Delambre*. [The case of *The Creadon* (2) was referred to.]

THE PRESIDENT (SIR CHARLES BUTT). It has been arranged that this Court shall not to-day decide all the matters in issue in this case. The question of the negligence of the *Schwan*, or at all events, of the collision between the *Albano* and the *Meggie*, having been caused by the act of the *Schwan*, is left open to abide the decision of one or other of the Courts of Appeal in another case which is before them. All I have to do is to determine the matter raised by the second paragraph of the statement of defence.

For the purposes of deciding this matter, I take it that the collision between the *Albano* and the *Meggie* was attributable to the action of the *Schwan* in the statement of claim mentioned, and was so caused as to entitle the plaintiff to recover the damage occasioned thereby in an action against the *Schwan*. That I take as admitted for the purpose of to-day. The question is, that being so, whether the collision and damages in question were caused by the improper navigation of the *Schwan* on an occasion upon which there was also a collision between the *Schwan* and the steamship *Delambre*, and by the same improper navigation as occasioned such last-mentioned collision.

If I find that it was, then I should hold that the *Albano* can recover no more in this action against the *Schwan* than her pro rata proportion of the statutory value of the *Schwan*, which has either been paid into court or secured.

I really think the question may be properly stated thus: If the collision between the *Schwan* and the *Delambre* were the necessary consequence of the mistake of the *Schwan*, and the

(1) 25 & 26 Vict. c. 63, s. 54: "The owners of any ship, whether British or foreign, shall not, in cases where all or any of the following events occur without their actual fault or privity; that is to say: . . . . . (4.) where any loss or damage is by reason of the improper navigation of such ship as aforesaid caused to any other ship . . . . be answerable in damages in respect . . . . of loss or damage to ships . . . . to an aggregate amount exceeding eight pounds for each ton of the ship's tonnage . . . ."

(2) 5 Asp. Mar. L. C. 585.

C. A. 1892.

THE SCHWAN. THE ALBANO.

The President.

wrongful act of the *Schwan* in starboarding as she did for the *Obedient*, then the defendants are entitled to judgment upon this part of the defence; but if it were not the necessary consequence, then, I think, the result would be that they are not so entitled.

In other words, if, after she had made a mistake, which for this purpose she admits having made, there was time and opportunity to correct the mistake, and by the use of ordinary care and skill to avoid any evil consequence that would otherwise have arisen from this mistake, and the *Schwan* did not employ those means, then she cannot say that she has established her plea.

Now, there were certainly not less than 300 yards of water between the *Obedient*, which she almost touched, and the *Delambre*, with which she afterwards came into collision, and which she sank. I have consulted the Elder Brethren on this point. They advise me that, in the first place, it was wholly unnecessary and improper to continue their hard-a-starboarding right out into the river after they had cleared the *Obedient*, and that the correction of that by a tolerably prompt porting would have prevented any accident with the *Delambre*. They advise me also, that if the pilot had been aware of the position of the *Delambre* some appreciable time before he was made aware of it, and before the light of the *Delambre* was brought right a-head of him, there would have been no difficulty in avoiding a collision with the *Delambre*.

That is upon the general aspect of the case; but if you take the pilot's own account of the matter, and that is the evidence upon which the defendants have to rely, it stands thus: he has payed off under a starboard helm till he has brought his ship to head somewhere towards the south shore, at an angle towards the south shore, but only three points away from the straight course up, and in that position he has, at two or three ships' lengths from him, going at half-speed at the time, the *Delambre*, and right ahead of him.

The Elder Brethren advise me, in that position there could have been no difficulty whatever in avoiding collision with the *Delambre*.

Therefore, upon any view of this case, the decision to which I come, under advice, is that this second collision—the collision

with the *Delambre*—was by no means the consequence of the mistake of the wrong navigation of the *Schwan* in the action she took to avoid collision with the *Obedient*.

But that is putting it higher than I need put it, because upon this issue the onus of proof rests entirely upon the defendants, and if they fail to prove clearly that it was the same act of improper navigation, or, in other words, the same occasion, then they fail.

Upon all grounds, therefore, I am of opinion that this portion of the defence fails, and that it is not open to the defendants to put the owners of the *Albano*, if they succeed in establishing negligence in the way described, in a position to receive a portion instead of the whole of the damages. Upon this part of the defence there will be judgment for the plaintiffs.

On March 8 and 9, 1892, the appeal by the owners of the *Meggie*, in the action of damage by collision between the *Meggie* and the *Albano*, was heard and dismissed by the Court of Appeal on the ground of inevitable accident. The following judgments were delivered :—

LORD ESHER, M.R. In this case the collision occurred between a steamship under weigh and a vessel at anchor, the steamship under weigh running into the vessel at anchor. The question is whether, having done so, she is to be held liable for the damage.

It seems to me that the rule of law with regard to such a collision has been laid down in the Court of Admiralty, and in the Privy Council, and more especially in the most distinct terms in this Court. I am of opinion that what is laid down in this Court is the law which must govern this Court, and if that law differs from the law which has been laid down in the Admiralty Court—which I do not think it does—or if it differs from what has been laid down in the Privy Council, the Privy Council has no power to overrule this Court, as the law to be administered here is the law which has been laid down in this Court.

Now, the case of *The Annot Lyle* (1) raised a question as to a

(1) 11 P. D. 114.

C. A. 1892

THE SCHWAN. THE ALBANO. Lord Esher, M.R.

great many of these definitions which were thought to have been somewhat loosely expressed in the Admiralty Court. It was a judgment given by Lord Herschell in the presence of myself and Fry, L.J., who agreed, therefore, according to the report, that the definition of the law with regard to this matter was as laid down by Lord Herschell, and agreed with him in the deliberate terms which he used, and these terms were: "Under these circumstances the burden is on the defendants to discharge themselves from the liability which arises from the fact that the *Annot Lyle* came into collision with and damaged a ship at anchor. The cause of the collision in such a case may be an inevitable accident not arising from negligent navigation; but unless the defendants can prove this, the law is clear, and they are liable for the damage caused by their ship." All I can say is that in a very long experience in the Admiralty Court, and dealing since that time with Admiralty Court judgments, there has always been a marked distinction between the phrase "inevitable accident" and the phrase "mere negligence," and that "inevitable accident" is a far larger term, and meant to be a much larger term than a mere case of negligence.

In the case of *The Indus* (1), where this matter was again considered, the law is stated thus: "It is the duty of a vessel in motion to keep clear of one at anchor, if the latter can be seen, and if she does not keep clear, then she must shew good cause for not doing so. In what way, then, could the defendants justify themselves? They could say that everything was done which could be done by careful seamen, but that some overwhelming storm occurred which prevented the ship from being navigated as she ought to have been. They could say that an entirely unforeseen accident, which could not have been prevented by proper management, occurred to the machinery, with the same result. There are yet other things which may be classed under the head of law, known as inevitable accident, which is a well-known expression, and, though it may not be philosophically correct, answers its purpose; but the defendants must clearly prove the occurrence of such an inevitable accident."

Now, these words were deliberately used with reference to what

(1) 12 P. D. 46.

C.A. 1892

THE SCHWAN. THE ALBANO. Lord Esher, M.R.

is taken to be a well-known phrase, "inevitable accident," and which is a head of law well known, and distinguished from the case of mere negligence. The ship in motion is not allowed in such a case to say merely, "I was not guilty of an ordinary want of care and skill." It must be shewn that it was an inevitable accident.

There is the law laid down by the Court, and that only leaves open this—What is the proper definition of inevitable accident? To my mind these cases shew clearly what is the proper definition of inevitable accident as distinguished from mere negligence—that is a mere want of reasonable care and skill. In my opinion, a person relying on inevitable accident must shew that something happened over which he had no control, and the effect of which could not have been avoided by the greatest care and skill. That seems to me to be the very distinction which was taken, and was meant to be taken, between the case of inevitable accident and a mere want of reasonable care and skill.

If that be so, and if the facts which have been found by the learned judge here were to be adopted by us, I should say that the defendants had failed to make out what they were bound to make out, because the learned judge in his judgment says that "there was no negligence in his not having observed particularly these vessels at anchor before because they were not in his way; and although, as is said, porting and hard-a-porting, and continuing under a port helm, would probably have avoided a collision, and it was probably an error of judgment not so to have proceeded, yet it was a manœuvre on the spur of the moment done under the man's best judgment, formed on the spur of the moment, which is entirely excusable, and cannot be held to be negligence."

If that was all that could be found, I should say that it was not enough for the defendants to shew that they were not guilty of a want of reasonable care and skill. That would not shew that there was not something better which could have been done, and which, if it had been done, could have avoided the accident. They would have fallen short, therefore, of shewing that it was an inevitable accident. But here the collision takes place under particular circumstances, and the question whether proper

C. A. 1892

THE SCHWAN. THE ALBANO.

Lord Esher, M.R.

manœuvres were employed, and whether any manœuvres could have avoided this collision, must be a matter of nautical skill. It is said that the master of the defendants' vessel was guilty of negligence in the ordinary sense—that is, a want of ordinary care and skill—and that he ought to have seen the lights of the *Obedient*, and of the vessel which was run into, the *Meggie*, and that he did not. I do not understand that the President found that he did not see them, but he said he did not observe them. There was no occasion for him to have observed them in the sense that he should fix in his mind where they were. They were not in his way, and he did not observe them. Therefore there was no negligence in his not observing them.

This is a case which requires a nautical opinion, and we are assisted by those who can give us the best opinion on the matter. The nautical assessors in the Admiralty Court could not agree; but we are fortunate in this, that the gentlemen who assist us do not differ but agree, and we must follow their advice. They say: "We are of opinion that the *Albano* was proceeding on a proper course and at a proper distance from the *Schwan*, which had passed her, and was two or three lengths ahead, when she suddenly starboarded." There is a nautical opinion that she was not too close, that she was going up with care, and was at least three lengths from the *Schwan* at the time that vessel starboarded. The opinion of our assessors goes on: "That the *Albano* was unable to distinguish the lights of the *Obedient* and the *Meggie*, owing to the *Schwan* intercepting her clear view a-head; that the *Albano* performed a right manœuvre in stopping, going astern, and putting her helm hard-a-port, by which the *Albano* just cleared the stern of the *Schwan*; that it was at this time she first saw the lights of the *Obedient* and the *Meggie*"—and here comes the important matter—"that there was no room, owing to the three-knot tide setting her up the river, to pass ahead of the *Obedient*"—that would be to go to the northward of her—"or under her stern, and between her and the *Meggie*." That, I understand to be that, if she had kept on with her hard-a-port helm she would have gone into the *Obedient* either way; she could not go a-head, and she could not go astern. What is the consequence of that? The assessors say

C. A. 1892

THE SCHWAN. THE ALBANO.

Lord Esher, M.R.

"that her then putting her helm hard-a-starboard was the best thing she could have done," that is, to avoid going into the *Obedient*. "Unfortunately, however, this did not prevent her coming into collision with the *Meggie*," Why? Because she put her helm hard-a-starboard, which was the best thing she could do. It follows from this that the tide took her, though she did the best thing she could, and that the tide, though she did all that was right, drove her down on the *Meggie*.

If that is so, it satisfies my view of inevitable accident, because something happened over which she had no control, and the effect of which could not be avoided by the greatest care and skill. In these circumstances I think she did satisfy what lay upon her to shew that this accident was caused, as far as she was concerned, by inevitable accident. That being so, though not for the same reasons as were given by the judge of the Admiralty Court, the decision is right, and the appeal must be dismissed.

FRY, L.J. Like the Master of the Rolls, I think we are bound to take the law which governs this case from the cases of *The Annot Lyle* (1) and *The Indus.* (2) With regard to *The Annot Lyle* (1) I should desire to point out that the judgment given by Lord Herschell, then Lord Chancellor, and concurred in by the Master of the Rolls and myself, states the matter in this way. "The cause of the collision in such a case may be an inevitable accident, not arising from negligent navigation, but, unless the defendants can prove this, the law is clear, and they are liable for the damage caused by their ship." Applying that to the facts of this case, it means this: that where one ship is riding at anchor and another ship in motion collides with her, the ship in motion is primâ facie liable, and can only escape from that liability by shewing inevitable accident. Then it is to be observed that the Lord Chancellor, speaking of inevitable accident, connects it with the notion of negligence to this extent, that he finds it "not arising from negligent navigation."

What is inevitable accident is a point evidently left open by that judgment, and which in that case it was not necessary to

(1) 11 P. D. 114. (2) 12 P. D. 46.

C. A. 1892

THE SCHWAN. THE ALBANO.

FRY, L.J.

decide. In the case of *The Indus* (1), in the same manner, it appears to me that the Court did not attempt any definition of what was inevitable accident. The Master of the Rolls, in the course of his judgment in that case, illustrated what would be inevitable accident, and he seems to me not to have separated the question entirely from that of "care," because he refers to unforeseen accident being that which could not have been prevented by proper management. His Lordship does not say by any management—he says "by proper management"; therefore neither of those judgments contains a definition of inevitable accident, but nevertheless they seem to me to contain indications by the learned judges that the question was not entirely separated from the question of care, or questions of negligence and want of care.

Now I turn to the earlier authorities to see whether inevitable accident has been defined with more exactitude than those cases required, and I go to the case of *The Marpesia* (2) in the Privy Council. Their Lordships there said (3) that: "They take the law as they find it laid down by Dr. Lushington in two cases. In the case of *The Bolina* (4) Dr. Lushington says (5), 'With regard to inevitable accident, the onus lies on those who bring a complaint against a vessel, and who seek to be indemnified—on them is the onus of proving that the blame does attach upon the vessel proceeded against; the onus of proving inevitable accident does not necessarily attach to that vessel; it is only necessary when you shew a primâ facie case of negligence and want of due seamanship.' Again, in the case of *The Virgil* (6), the same learned judge (7) gives this definition of inevitable accident: 'In my apprehension, an inevitable accident in point of law is this, viz., that which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution, and maritime skill. If a vessel charged with having occasioned a collision should be sailing at the rate of eight or nine knots an hour, when she

(1) 12 P. D. 46.
(2) Law Rep. 4 P. C. 212.
(3) At p. 219.
(4) 3 Notes of Cases, 208.
(5) At p. 210.
(6) 2 Wm. Rob. 201.
(7) At p. 205.

ought to have proceeded only at the speed of three or four, it will be no valid excuse for the master to aver that he could not prevent the accident at the moment it occurred; if he could have used measures of precaution, that would have rendered the accident less probable.'" Then the Privy Council proceed: "Here we have to satisfy ourselves that something was done, or omitted to be done, which a person exercising ordinary care, caution, and maritime skill, in the circumstances, either would not have done, or would not have left undone, as the case may be."

Now, I find no intention on the part of the Court, either in the case of *The Annot Lyle* (1) or *The Indus* (2), to overrule or depart from that earlier definition of inevitable accident, and I cannot help thinking that the Master of the Rolls, in the definition which he has given, has introduced a somewhat new rule, a rule which, as far as I can find, is not sanctioned by any of the earlier authorities, and, for myself, I prefer adhering to the definition of inevitable accident given by Dr. Lushington in the cases referred to and adopted by the Privy Council in the case of *The Marpesia.* (3)

Before parting from this, I wish to make one more observation—that it appears to me that inevitable accident as applied to two vessels both in motion, and to one vessel in motion and another at rest, differs in the sense that it is obvious that the facility with which a stationary body may be avoided is very much greater than the facility with which a moving body may be avoided, especially when the law of that motion is more or less unknown; and therefore, though I think that the principle of law applicable to the two cases is the same, I think the fact makes an important difference in the application of the common principle to the two different cases.

I now apply the rule which I have accepted to the facts of this case. I will say at once, that if the matter had been left to my judgment I should have thought it was possible for a vessel to make her way up the Thames, with ordinary diligence and proper seamanship, without coming into collision with another

(1) 11 P. D. 114. (2) 12 P. D. 46.

(3) Law Rep. 4 P. C. 212.

C. A. 1892

THE SCHWAN. THE ALBANO.

FRY, L J.

vessel; but the Master of the Rolls has already read the advice which we have received from the nautical gentlemen who are assisting us. It is impossible for me not to accept that advice; and, accepting that advice, it appears to me not to be made out in this case that the *Albano* acted with any want of ordinary care or ordinary skill, or that she acted in any way other than the best. If she acted in the best manner in which she could act, it follows that whatever rule we adopt in the definition of inevitable accident, inevitable accident has occurred in this case, and the appeal fails.

LOPES, L.J. I have nothing to add except that I wish to express my view with regard to the proper definition of inevitable accident. I think that the proper definition, and the one I desire to adopt, is the one given in *The Marpesia* (1), namely, "Inevitable accident is that which the party charged with the damage could not possibly prevent by the exercise of ordinary care, caution, and maritime skill." I think that is a definition which, according to my view, is consonant with all the authorities which preceded this case, and equally consonant with the later authorities, *The Annot Lyle* (2) and *The Indus.* (3) I know no distinction as regards inevitable accident between cases which occur on land and those which occur at sea. If this had been a case on land, I should think the definition I have given from *The Marpesia* (1) would be equally applicable. Therefore, I think that this appeal should be dismissed.

In consequence of this decision of the Court of Appeal, the defendants, the owners of the *Schwan*, submitted to judgment being entered against them on the first issue in the action of the owners of the *Albano* against the *Schwan*; and, on March 22, 1892, Sir Francis Jeune made a decree pronouncing that the collision between the *Meggie* and the *Albano* was occasioned by the fault of the *Schwan*, and he "further pronounced that the said collision, and the said damage occasioned thereby, arose from the fault or default of the owner's master and crew of the

(1) Law Rep. 4 P. C. 212. (2) 11 P. D. 114.
(3) 12 P. D. 46.

said steam-vessel *Schwan*, or some or one of them, on a distinct occasion from the damage occasioned by a collision between the said steam-vessel *Schwan* and the steam-vessel *Delambre*, and that the defendants are not entitled in respect of the damages recoverable in this action to the benefit of the decree of limitation of liability, in action 1891, Fo. 157."

From the second part of this decree the defendants appealed.

July 26. Sir *Walter Phillimore*, and *J. P. Aspinall*, for the appellants (defendants), the owners of the *Schwan*. It must be taken that the blame for both collisions rests with the *Schwan*; but her owners contend that, having limited their liability and paid the amount into Court, the *Albano* must come in and claim against that fund; for, assuming negligence in the *Schwan*, it was one act of negligence which led to her collision with the *Delambre*, and to the collision between the *Albano* and the *Meggie*. The case attempted to be made against the appellants is that the *Schwan* continued to starboard instead of correcting it by porting; so that it is an omission that is said to have brought about the collision with the *Delambre*; but to continue one act of improper navigation is not another act of improper navigation; the initial error was the cause of both collisions; and the collision with the *Delambre* was in consequence of the mistake of the *Schwan* in the measures she took to avoid collision with the *Obedient*. The case, therefore, falls within the principle laid down in *The Creadon* (1), that where the first collision was the substantial and efficacious cause of the second, they were not separate acts of negligence.

So in *The Rajah* (2), where a steamship ran first into a ship and then into her tug, it was held that the whole of the damage was caused substantially at the same time and on the same occasion, and, therefore, it was one act of improper navigation for which the owner of the steamship was entitled to limit his liability to 8*l*. per ton.

If, however, contrary to the contention of the appellants, the Court should find that there were two acts of improper navigation, viz., the original starboarding of the *Schwan* causing the

(1) 5 Asp. M. L. C. 585. (2) Law Rep. 3 A. & E. 539.

C. A. 1892

THE SCHWAN. THE ALBANO.

Albano to come into collision with the *Meggie*, and the continued action of the starboard helm causing the *Schwan* to come into collision with the *Delambre*, then it is submitted that, as that assumes that there was time and opportunity to correct the starboarding, and by porting go clear of the *Delambre*, the not porting was the default of the pilot alone; and no contributory negligence has been proved against the crew of the *Schwan* which the appellants can be called upon to rebut; so that the owners of the *Schwan* would be exempt from liability on the ground of compulsory pilotage: *Clyde Navigation Co.* v. *Barclay*. (1)

It is also contended that s. 506 of the Merchant Shipping Act, 1854, has no application to a case like the present, as there is no reference in that section to damage to another ship; but in sub-s. 4 of s. 54 of the Merchant Shipping Act Amendment Act, 1862, the words are "damage to ships" in the plural, shewing that the legislature intended that the limitation of liability should extend to the whole of the damage due to the improper navigation of the wrongdoing ship, although that damage might have been done to more than one ship.

Kennedy, Q.C., and *F. W. Raikes*, for the respondents (plaintiffs), the owners of the *Albano*, were not called upon. (2)

LORD ESHER, M.R. The *Schwan* was going up the river, and the first ship she had to deal with was the *Obedient*. If the *Obedient* had been there alone she would have had her own choice whether she would starboard her helm and go to the south, or port and go to the north. So far as the *Obedient* was concerned she was bound to do one or the other; but with regard to the other vessels she had not that free choice, for on the south side of the *Obedient* there lay two vessels, one of them nearly astern of the *Obedient*, called the *Meggie*, and another, a vessel called the *Delambre*, which was much more to the south. There was a space between the *Meggie* and the *Delambre*; but they were there,

(1) 1 App. Cas. 790.

(2) *The Attorney General* (Sir *R. E. Webster*), and *H. Stokes*, appeared for the owners of the *Delambre*; but owing to the decision of the Court in favour of the owners of the *Albano*, they were not called upon to argue, and the Court refused their application for costs, Lord Esher, M.R., intimating that the owners of the *Delambre* might have waited until they were sent for.

C. A. 1892

THE SCHWAN. THE ALBANO.

Lord Esher, M.R.

and if the *Schwan* went to the south of the *Obedient*, they presented a difficulty. In these circumstances her proper way of navigating was to have gone to the northward of the *Obedient*, in which case there would have been no difficulty at all; but the *Schwan* starboarded her helm, and crossed the bows of the *Obedient* as she lay at anchor, very close to her indeed.

So far as the *Obedient* is concerned, there is nothing to be said about that; but, with regard to the other vessels, she put herself in a very critical position. Still, the moment she had got her head so far to the southward as that it was obvious she would clear the *Obedient*, she had then done with the *Obedient* altogether, and she had to consider the other ships. There was the *Meggie*. Unless she ported very hard indeed she would not go into the *Meggie*; but, unless she ported immediately, she would very likely go into the *Delambre*, as, in fact, she did.

Then, what was her duty, taking her as a ship under compulsory pilotage? Why, she was bound, the moment she could do so without going into the *Obedient*, to port her helm. If she had ported her helm she would have straightened herself up the river, and, if she could have done that in time, she would have gone straight up the river between the *Meggie* and the *Delambre* without touching either. Now, with regard to the *Delambre*, if that were a thing possible to be done, she ought to have done it; but she did not do it. We are advised, and it seems obvious, that, the moment her course was clear of the *Obedient*, if there was time to port her helm so as to escape the *Delambre*, she ought to have done it, assuming that it was a mistake to have starboarded her helm and to have gone to the south of the *Obedient* at all. This was a mistake in seamanship which I should take to be a mistake with regard to the *Obedient*; but it is immaterial, as there was room for the *Schwan* by the use of ordinary care and skill to have avoided the consequence of that mistake, and what happened was therefore the result of another mistake—it is not the first mistake which was the cause of the accident to the *Delambre*, but the second.

The first mistake was the cause of the accident which happened to the *Albano*, because it was by starboarding her helm that the *Schwan* prevented the *Albano* from keeping her course and going

C. A. 1892

THE SCHWAN. THE ALBANO.

Lord Esher, M.R.

up between the *Meggie* and the *Delambre*. She put the *Albano* into such a position between the *Meggie* and the *Delambre*, that the collision of the *Albano* with the *Meggie* was not the fault of the *Albano*, but of the *Schwan*, and that has been so found in an action between the *Meggie* and the *Albano*.

There was injury to the *Albano* which was caused by the first bad seamanship of the *Schwan*. That being so, and there being room for her to do it, the *Schwan* could, by the use of ordinary care and skill, have avoided the collision with the *Delambre*. There were therefore two mistakes causing accidents to two ships. That would leave the *Schwan* liable to two ships in respect of two different mistakes, so that she cannot have this limited liability divided between the two. She is liable to each of them to the whole extent of her statutory liability. She cannot put them together under the same limitation decree.

Then the *Schwan* says: "I am not liable at all, and, at all events, if I was liable to the *Albano*, I was not liable to the *Delambre*, because it was solely the fault of the pilot that he did not port his helm when he was just clear of the *Obedient*, and he was a compulsory pilot. Now, assuming that he was a compulsory pilot, on whom does the burden of proof lie? Why, on the ship which puts forward the excuse that, though she was badly navigated, it was solely the fault of the compulsory pilot. It is necessary to prove that there was not only fault in the pilot, but that the collision in question, that is, the collision with the *Delambre*, was solely his fault. On reading the evidence of the pilot and of the look-out man, so far from thinking that the learned judge was wrong in saying that the ship had not fulfilled the burden of proof which lay on her, so far from thinking that they met the onus of proof which rested upon them, I think they proved the contrary, and that the fault was the joint fault of those on board the ship and of the pilot, and that those on board did not give him the information with regard to the position of the *Delambre* to which he was entitled. Under the ordinary rules, therefore, it was not solely the fault of the pilot. Therefore, I think the judgment of the learned judge was right, and that, as to the facts of the collisions, there were two separate causes of the two collisions.

I agree with the law laid down by the President of the Admiralty Court in the case of *The Creadon*. (1) I do not think anything turns upon whether s. 506 of the Act of 1854 applies or not to a ship. It cannot be that s. 54 of the Act of 1862 is meant to apply to collisions between two different ships on different occasions, and that Sir Walter Phillimore admits. If a ship runs into one ship on a Monday morning, and into another ship at another place on Tuesday morning, he admits that the ship must be liable for each of these two. Then if the ship runs into one ship in the morning and into another in the afternoon, what does that signify? So if you run into one ship half an hour before you run into another, what difference does it make? It is not the time which is the substantial thing; but whether both are the result of the same act of want of seamanship, and, if they are not, the Act does not apply, except as to each of them separately. This is the result of what is rightly laid down in the case of *The Creadon*. (1) I am of opinion, therefore, that this appeal must be dismissed.

BOWEN, L.J. I am entirely of the same opinion. The question arises in a rather singular form. The act of starboarding, of which the *Schwan* was guilty and by which she came close to the *Obedient*, was a beginning which led to two separate accidents. The *Schwan* having starboarded, continued starboarding and sank the *Delambre*. She was responsible to the *Delambre* for sinking her. But that was not the only result which was brought about by the improper starboarding of the *Schwan*, because she went across the bows of the *Albano*, which was coming up behind her, and drove the *Albano* by a chain of unfortunate necessity into collision with the *Meggie*, and the *Albano* suffered herself in the collision and complains of the *Schwan's* action. The owners of the *Schwan* do not deny that they are responsible to the *Albano* for the accident which happened to that vessel. They admit that starboarding across her bows was a wrong manœuvre, for the consequences of which they are responsible; but they say that under s. 54 of the Merchant Shipping Act Amendment Act of 1862 they are also at the same

(1) 5 Asp. M. L. C. 585.

C. A. 1892

THE SCHWAN. THE ALBANO.

BOWEN, L.J.

time liable to the *Delambre* because the same thing, the crossing of the bows of the *Albano*, led to the sinking of the *Delambre*. They say that under that section, passed for the protection of shipowners against the negligence of their captains, and limiting their liability in cases of negligence, they are only liable for a proportion of the amount to the *Albano*, and that they have to reckon with the *Delambre* as well. The answer which the *Albano* makes raises the point we have to decide.

The *Albano* says that it was not the same act of improper navigation which drove us to run into the *Meggie* that led you into the *Delambre*. It was your starboarding across our bows which actually drove us into the *Meggie*, and you still might have avoided the *Delambre* if you had navigated properly, for you might have ported and gone up the river.

On that contention being raised the question we have to decide is whether it was the original alleged act of improper navigation which caused both the injury to the *Albano* and to the *Delambre*; or whether, even if the original starboarding were a mistake and was a wrongful act, there was not time and opportunity to correct the mistake, and whether by the use of ordinary care and skill the *Schwan* might not still have corrected it and avoided the *Delambre*. It seems to me that the *Albano* has a right to say that the *Schwan* might have corrected the mistake even if she had passed across the bows of the *Albano*, because this view is disclosed by the evidence, and agrees with the advice given to us by our assessors. They entertain no doubt that even if the bows of the *Albano* had been crossed, there was still time for the *Schwan* to have ported her helm, and to have gone safely up the river without any injury to the *Delambre* whatever. This does not solve the entire point, because it is a case where there was compulsory pilotage. Supposing that we should find that the continuation of the mistake in seamanship was solely the fault of the pilot, then the *Schwan* would have a right to say that, though it was the second accident which ran us into the *Delambre*, the second accident was the fault of the pilot and of nobody else. How does the evidence stand? The pilot is called, and he professes to remember nothing except one single point, to which he sticks with great pertinacity, and that point is, that if

he had been warned earlier he might have avoided the *Delambre*. The look-out man says that he reported the light of the *Delambre* when he saw it; but the pilot says the report he received was from the captain, and that he never received it until too late. On whom is the burden of proof in this case? As the Master of the Rolls has pointed out, it is clearly on the owners of the *Schwan*. They have to shew that the second collision was due to an act of navigation which they can distinguish from the ordinary act of starboarding, and was due wholly to the pilot and not to their own crew or master. It will not do to shew that the pilot was in fault unless they can shew that the pilot only was in fault, and that some act of negligence on his part, apart from the master and crew, caused the accident. It may very well be that the pilot after he was warned might still have had time to port his helm and go up the river without running into the *Delambre*. That may be, but it is not quite the question. If he had been warned earlier—and this is the real point it seems to me—could he have avoided the second collision? If he could, it is impossible to say that the neglect of the look-out man to warn him may not have contributed to the collision, and the burden being on the *Schwan* to shew that it did not, the owners of the *Schwan* have failed to make out their case. With regard to the Act of Parliament and the construction put on it, I have nothing to add to what the Master of the Rolls has said. It is clear that you must examine the section in each case to see what particular damage is caused by the same act of improper seamanship; that if you find two acts which are distinguished one from another, which lead to loss or damage, then the double loss or damage is not entirely due to the same act. It is due to two acts instead of to one act. Otherwise, as has been pointed out, a ship might after making one blunder go blundering up the whole river. It is quite impossible to take that view. The question is, what unseamanlike act of the person in charge of the ship has caused a particular accident? The law speaks plainly with reference to that, and the law as laid down in *The Creadon* (1), and as expounded by the Master of the Rolls in his judgment, seems to me to be so clear as to make it unnecessary to add anything further.

(1) 5 Asp. M. L. C. 585.

C. A. 1892

THE SCHWAN. THE ALBANO.

KAY, L.J. This is not a question of law, but a question of fact, and it is put very neatly in the judgment of the learned judge. The question is, Was it a necessary consequence of starboarding the helm of the *Schwan*, in order to pass the *Obedient*, that she should run into the *Delambre*? It appears to me to be quite clear, and the assessors agree, that it was not the necessary consequence of that alteration of the course, and that there was plenty of time after that to have noticed the lights of the *Delambre*, and then to have altered again the course of the ship so that she would not have come into collision with the *Delambre*. I understand that an action was brought by the owners of the *Delambre* against the *Schwan*, by which they recovered damages, and this is the action of the owners of the *Albano* against the *Schwan*. The *Albano* was following the *Schwan* up the river, a little to the south. By the alteration of the course of the *Schwan* she crossed the bows of the *Albano*, which was coming up after her, and the *Albano*, which seems to have been laying a course which would have taken her clear of everything, had to alter her course, so that she ran foul of the *Meggie*, which was a ship lying a little behind the *Obedient* and a little further south in the river. That the *Schwan* is liable to the *Albano* no one denies; but it is said that there was only one cause of the accident, and that was the original altering of the course of the *Schwan* by starboarding her helm. I do not agree with that view. No doubt with that starboarding of the helm the ship would have run into the *Delambre*; but there was plenty of time to alter her course again, and it was the not altering her course again which was the proximate cause of the collision with the *Delambre*. Then there was a point whether the *Schwan* might not be excused in this action on the ground of her being at the moment under a compulsory pilot. If it was the fault of the compulsory pilot that she originally starboarded her helm to avoid the *Obedient*, and his fault alone, then it seems to me the *Schwan* might be excused; but I understand the view taken is this—that it was the fault not alone, or it has not been proved that it was the fault alone, of the pilot that she starboarded her helm, but that originally it was partly the fault of the pilot, and also of the look-out man, who ought to have given the pilot proper notice of the lights of the *Obedient* and of the *Delambre*. If the pilot had known before he starboarded his

helm that the *Delambre* was lying where she was, namely, to the southward of the *Obedient*, he would not have starboarded his helm, but would have ported and passed on to the other side of the river. Therefore it is not made out that the fault was the sole fault of the pilot.

C. A. 1892

THE SCHWAN. THE ALBANO.

Appeal dismissed.

Solicitors for the appellants (defendants), the owners of the *Schwan*: *Clarkson, Greenwells & Co.*

Solicitors for the respondents (plaintiffs), the owners of the *Albano*: *Pritchard & Sons, for Hearfields & Lambert, Hull.*

T. L. M.

The Mode of Citation of the Volumes of the LAW REPORTS, commencing January 2, 1893, will be as follows:—

In the First Series,
[1893] 1 Ch. [1893] 2 Ch. [1893] 3 Ch.

In the Second Series,
[1893] 1 Q. B. [1893] 2 Q. B. [1893] P.

In the Third Series,
[1893] A. C.

INDEX.

ECCLESIASTICAL.

BURIAL — *Faculty for Removal of Human Remains buried in Parish Church — Vaults of Ancient Date — Inclination of Court to consult Wishes of Persons interested.*] Where application is made to the Court for a faculty to authorize human remains interred in a church or disused churchyard to be removed therefrom and re-interred in consecrated ground elsewhere, the Court, if it grants the faculty, will insert in it provisions authorizing members of families whose relatives are buried in such church or churchyard to remove the remains of their relatives to any particular churchyard or consecrated cemetery selected by them for the purpose of re-interment. —In a faculty authorizing, on sanitary grounds, the removal of human remains interred in a parish church, provisions were, by the directions of the Court, inserted exempting from the operation of the faculty several ancient family vaults. RECTOR, &C., OF ST. HELEN'S, BISHOPSGATE, WITH ST. MARY OUTWICH *v.* PARISHIONERS OF SAME 259

2. —— *Faculty — Discretion — Refusal to grant Faculty for removal of Dead Body intended to be cremated—Service of Notice of Application on Executors—Practice as to Grants of Faculties for Burial in accordance with expressed Wishes of Deceased.*] The dead body of a testator whose will contained no directions as to the mode or place of his burial, but who had expressed a wish that his wife should have the option of disposing of his remains in one of two ways, either by burial or cremation, was buried by his widow in a mausoleum in the consecrated part of Kensal Green Cemetery. Eighteen years afterwards the widow applied to the Court for a faculty for the removal of the remains from the mausoleum where they had been so buried to the crematorium at Woking for the purpose of being there cremated, the ashes resulting from the cremation to be then placed in an urn, and the urn and its contents deposited in the mausoleum. The Court having directed that the executors of the

BURIAL—*continued.*

will, if living, should have notice of the application, and that evidence should be brought in as to whether the cremation could be carried out without any difficulties as to sanitation, it appeared that the executors were dead and that the cremation could be carried out so as to be perfectly decent and harmless to health:—*Held* that the faculty must be refused. — The Court is accustomed in proper cases to grant faculties for the removal of remains buried in consecrated ground for the sole purpose of such remains being re-interred in other consecrated ground, and would not be justified in granting a faculty for enabling remains to be removed after burial for cremation; but *semble*, where there has been a previous cremation in pursuance of directions left by the deceased, there is no legal objection to the ashes resulting therefrom being buried in consecrated ground, accompanied with the use of the Burial Service. IN THE MATTER OF LIEUT.-COL. DIXON - - - - - - 386

3. —— *Faculty—The Burial Act*, 1857 (20 & 21 *Vict. c.* 81), *s.* 23—*Order in Council ordering that all Human Remains under a Parish Church be removed—Duty of Ecclesiastical Court to issue Faculty for Removal—Costs.*] The 23rd section of the Burial Act, 1857, enacts, inter alia, that, after the notice referred to in the section, "it shall be lawful for Her Majesty, upon the representation of one of Her Principal Secretaries of State by and with the advice of the Privy Council, from time to time to order such acts to be done by or under the directions of the churchwardens or such other persons as may have the care of any vaults or places of burial for preventing them from becoming or continuing dangerous or injurious to the public health . . . and that such churchwardens or other persons shall do or cause to be done all acts ordered as aforesaid, and the expenses incurred in and about the doing thereof shall be paid out of the poor rates of the parish."

BURIAL—*continued.*
An Order in Council was made under the above section whereby it was ordered that the churchwardens of the parishes of St. Mary-at-Hill and St. Andrew Hubbard, in the City of London, or such other person or persons as might have the care of the vaults under the parish church of the said parishes, should adopt or cause to be adopted the following measures, viz., that all human remains found beneath the floor of the said parish church should be removed and forthwith reburied in Norwood Cemetery or some other consecrated burial-ground in which interments could legally take place; the work to be carried out under the supervision and to the satisfaction of the Medical Officer of Health for the City of London. After notice of this Order, the rector and churchwardens of the united parishes petitioned the Court for a faculty for the removal of the remains underneath the parish church to a consecrated site in Norwood Cemetery:—*Held*, that the petitioners had taken the proper course, and that it was the duty of the Court to decree a faculty directing the churchwardens to do what was required to be done by the Order in Council, with provisoes inserted for the safeguard of the fabric of the church, and for authorizing the families of persons buried in the vaults to remove the remains of their relatives to any consecrated burial-ground they might select. RECTOR, &c., OF ST. MARY-AT-HILL WITH ST. ANDREW HUBBARD *v.* PARISHIONERS OF SAME **394**

—— Appropriation of portion of churchyard for widening public thoroughfare—Removal of bodies to cemetery - **161**
See CHURCHYARD.

CASES—*Peek* v. *Trower* (7 P. D. 21) explained
See CHURCH. [**269**

—— *Tetbury, The Vicar of* v. *The Churchwardens and Inhabitants of the Parish of Tetbury* ([1892] P. p. 271, n. (2)) considered **269**
See CHURCH.

CHURCH — *Faculty — Appeal — Stained Glass Window in Chancel—Opposition of Majority of Parishioners—Discretion of Ordinary—Memorials not admissible in Evidence—Costs.*] The rector and churchwardens of a parish petitioned the Ordinary for a faculty enabling them to substitute for the east end window (almost entirely glazed with plain glass) then existing in the chancel of their parish church a stained glass memorial window, the cost of which was to be paid for by a parishioner subsequently added as a petitioner. No serious objection was raised to the design of the proposed window; but the grant of the faculty was opposed on the ground that the majority of the parishioners desired that the existing window should remain unaltered, and that by the erection of the stained glass window the ventilation of the church would suffer, and the chancel be darkened so as to render it inconvenient for public worship. The judge of the Consistory Court of the diocese found that the last two of these grounds of objection were not sustained by the evidence, decreed the faculty to issue as prayed, and condemned the opponents in costs:—*Held*, on appeal—That although it was proposed to place the stained glass window in the chancel, the discretion of the

CHURCH—*continued.*
Ordinary as to granting or refusing the faculty was the same as if it had been proposed to place the window in any other part of the church:—That assuming the evidence proved that the majority of the parishioners wished that the existing window should be retained, their wishes in nowise fettered the Ordinary in exercising such discretion:—That the Court below had come to a right conclusion on the evidence, and the decree appealed from must, so far as it directed the faculty to issue, be confirmed:—That the decree must be varied as regards costs, and each party be left to bear their own costs both in the Appellate Court and the Court below.—*Peek* v. *Trower* (7 P. D. 21) explained.—Decision by the Consistory Court of Rochester that in a contested cause of faculty memorials signed by parishioners asking that the faculty prayed for be granted, are inadmissible as evidence (see contrà *The Vicar of Tetbury* v. *The Churchwardens and Inhabitants of the Parish of Tetbury*, [1892] P. p. 271, note (2)). NICKALLS *v.* BRISCOE - - - - **269**

CHURCHYARD—*Jurisdiction—Faculty—Churchyard closed for Burials—Appropriation of Portion for widening Public Thoroughfare—Removal of Human Remains to Consecrated Cemetery—The City of London Sewers Act*, 1851 (14 & 15 *Vict. c. xci.*) *s.* 35.] The vicar and churchwardens of a parish church in the City of London applied to the Court to sanction an agreement between the vicar and the Commissioners of Sewers of the City of London to appropriate a portion of the parish churchyard closed for burials, for the widening of an adjoining street. At the hearing of the application it was proved that the proposed widening would be of great convenience to the congregation of the church, and to the public generally:—*Held*, that the Court had jurisdiction to authorize by faculty the appropriation of the portion of the churchyard required for the proposed widening of the street, so long as it should be used for the purpose, and the removal to a vault to be constructed in the churchyard of all human remains disturbed in carrying out the works authorized by the faculty.—There being no room in the churchyard for the vault directed to be constructed as above mentioned, the Court ordered the remains disturbed to be placed in the crypts of the church. The Commissioners of Sewers and the vicar and churchwardens subsequently petitioned the Court to authorize the remains placed in the crypts under the order of the Court, as well as certain other remains found in one of the crypts, to be removed to the City of London Cemetery, at Little Ilford in Essex, and it appeared that such removal was expedient on sanitary grounds:—*Held*, that the Court had jurisdiction to authorize the remains to be removed as prayed, and to be re-interred in the consecrated portion of the Ilford Cemetery. VICAR, &c., OF ST. BOTOLPH WITHOUT ALDGATE *v.* PARISHIONERS OF SAME. VICAR, &c., AND THE CHURCHWARDENS OF ST. BOTOLPH WITHOUT ALDGATE *v.* PARISHIONERS OF SAME. COMMISSIONERS OF SEWERS OF THE CITY OF LONDON, AND VICAR, &c., OF ST. BOTOLPH WITHOUT ALDGATE *v.* PARISHIONERS OF SAME: HARRIS INTERVENING [**161**

CHURCHYARD—*continued.*

2. —— *Churchyard closed for Burials—Faculty for Laying out Churchyard as Public Garden—Metropolitan Open Spaces Act*, 1881 (44 & 45 *Vict.* 34), *s.* 5—*Order as to Private Vaults.*] Where a faculty had been decreed to issue allowing a churchyard, closed for burials and containing two private vaults, one in repair and the other out of repair, to be laid out as a public garden, subject to future order as to how such vaults were to be dealt with, the Court made an order that there should be no interference with the vault in repair, but that the vault out of repair should be levelled with the ground and filled up.—Rule of the Court in such cases. VICAR AND CHURCHWARDENS OF ST. BOTOLPH WITHOUT ALDGATE *v.* PARISHIONERS OF SAME - 173

CLERGY—*Duplex querela—Presentation by College on Nomination of Roman Catholic*—13 *Anne, c.* 13—"*Nomination*"—*Order in Council of February* 26, 1880, *approving Emmanuel College Statutes—The University of Cambridge and Oxford Act*, 1877 (40 & 41 *Vict. c.* 48), *ss.* 28, 45.] The 1st section of 13 Anne, c. 13, enacts that "Every Papist and every mortgagee, trustee, or person in any ways intrusted directly or indirectly, mediately or immediately, by, or for any such Papist, whether such trust be declared by writing or not, shall be disabled and is hereby made incapable to present, collate, or nominate to any benefice, prebend, or ecclesiastical living, school, hospital, or donative, or to grant any avoidance of any benefice, prebend, or ecclesiastical living, and every such presentation, nomination, collation, and grant, and every admission, institution, and induction to be made thereupon shall be utterly void."—The statutes of a college in the University of Cambridge, approved by Order in Council under the Universities of Oxford and Cambridge Act, 1877, provided that the heir for the time being of Sir W. D. should have the perpetual right of nominating to the college for presentation to the rectory of B., within three months of such rectory being vacant, a fit person being a graduate of the college and qualified by birth or education as in the statutes specified, and that in the event of such nomination not being made to the college within three months of the avoidance of the rectory, the rectory for that turn only should be subject to the same rules of nomination and presentation as the livings in the general patronage of the college.—The libel in a suit of duplex querela pleaded, that the above-mentioned rectory of B. becoming vacant in June, 1890, a Roman Catholic, Sir A. D., claiming to be the heir of Sir W. D., nominated the promovent in July of that year, and in accordance with the college statutes, to the college for presentation by them to such rectory; that on November 22 following, the college presented the promovent to the bishop of the diocese and to the rectory, stating that they did so on the nomination of Sir A. D.; and that the bishop in March, 1891, refused to institute the promovent thereto, his sole objection being that the nomination was by a Roman Catholic. The bishop objected to the admission of the libel on the ground that it did not disclose any right to the relief prayed for in the suit:—*Held*, that the nomination made by Sir A. D. was a nomination within

CLERGY—*continued.*

the provisions of 13 Anne, c. 13, and void under that Act, and that the libel must be rejected with costs. BOYER *v.* BISHOP OF NORWICH - 41

—— Church Discipline Act—Appeal in criminal suit - - - - - 175
See PRACTICE.

CREMATION—Removal of dead body intended to be cremated—Ecclesiastical law 386
See BURIAL. 2.

FACULTY—Churchyard—Faculty for laying out churchyard as public garden - 173
See CHURCHYARD. 2.

—— Stained glass window—Opposition of majority of parishioners - - 269
See CHURCH.

—— Burial—Removal of dead body buried in church - - - - 394
See BURIAL. 3.

PRACTICE—*Church Discipline Act* (3 & 4 *Vict. c.* 86)—*Criminal Suit—Dependence of Cause in deference to Proceedings in Temporal Courts—Lapse of Time—Disobedience to Monition—Discretion to refuse enforcement of Monitions by means of Proceedings in Original Suit.*] Monitions in a criminal suit under the Church Discipline Act against a clerk in orders, though general in terms and admonishing the defendant to abstain for the future from the like offences to those the Court at the hearing pronounced him to have committed, are not to be regarded as forbidding him under pain of being pronounced in contempt to resort at any time during his life to the practices from which he has been so admonished to abstain.—Upon an application against a clerk in orders to enforce monitions by which he had been admonished to abstain in future from certain illegal practices in the conduct of Divine service, it appeared that in July, 1885, the defendant, a clerk in orders, holding a benefice within the province of York, had been pronounced by the Court to have, in July, 1884, committed certain offences in matters of ritual when officiating in his church; that two monitions to refrain from the like offences (dated December 31, 1885, and June 7, 1886), obedience to which it was sought to enforce, had been duly served on him on January 2, 1886, and June 13, 1886, respectively; that, founded upon disobedience to the former of these two monitions, a decree of suspension ab officio for six months had been pronounced against him in the same suit in April, 1886, and subsequently, the suspension having been disregarded, proceedings by way of significavit had been taken, under which he was imprisoned from May 4, 1887, to May 20 in that year; that during all the time between August 7, 1886, and April 28, 1887, and between May 20, 1887, and August 7, 1890, proceedings in the temporal Courts were pending relative to and in connection with the suit; and that in October, 1890, the defendant, when officiating in his church, repeated some of the offences he had been pronounced guilty of at the hearing. The application to enforce the monitions was made on April 9, 1891; and there was no evidence before the Court

PRACTICE—*continued.*
as to the conduct of the defendant between May 20, 1887, and October 9, 1890:—*Held*, that having regard to the time which had elapsed since the expiration of the sentence of suspension, the application ought not to be granted. HAKES *v.* COX - - - - - - - 110

2. —— *Appeal in Criminal Suit — Church Discipline Act* (3 & 4 *Vict. c.* 86), *s.* 15—*Security for Costs.*] A criminal suit, under the Church Discipline Act (3 & 4 Vict. c. 38), having been promoted against the incumbent of a parish, and proof given of the charges made in the articles in the suit, the bishop of the diocese pronounced sentence suspending the defendant for two years ab officio et beneficio, and condemning him in the costs of the proceedings. The defendant appealed to the Court of Arches.—On motion on behalf of the bishop, who had promoted his own office and appeared as respondent in the appeal, the Dean of Arches, on proof that the defendant was in a state of poverty, and had not paid any part of the costs in which he had been condemned, ordered the defendant to give security for the costs of the appeal in the sum of 100*l.* within four months from the date of making the order for security. O'MALLEY *v.* BISHOP OF NORWICH [175

PUBLIC WORSHIP—Illegal practices in the conduct of divine service—Disobedience to monition—Lapse of time—Enforcement of monition - - - - 110
See PRACTICE.

ROMAN CATHOLIC—Benefice—Presentation 41
See CLERGY.

STATUTES:—
13 Anne, c. 13 - - - - 41
See CLERGY.
3 & 4 Vict. c. 86 - - - - 110
See PRACTICE.
—— —— s. 15 - - - - 175
See PRACTICE. 2.
14 & 15 Vict. c. xci., s. 35 - - - 161
See CHURCHYARD.
20 & 21 Vict. c. 81, s. 23 - - - 394
See BURIAL. 3.
40 & 41 Vict. c. 48, ss. 28, 45 - - 41
See CLERGY.
44 & 45 Vict. c. 34, s. 5 - - - 173
See CHURCHYARD. 2.

WORDS:—
"Nomination" - - - - 41
See CLERGY.

PROBATE.

ADMINISTRATION—Grant of—Executrix and sole legatee not to be found—Grant to representative of next of kin of testatrix 6
See ADMINISTRATION WITH WILL ANNEXED.
—— Grant of—"Widow, but no issue"—Pauper lunatic—Grant to clerk of guardians 50
See GRANT OF ADMINISTRATION.
—— Lunatic widow—Next of kin unable to find justifying security - - - 145
See GRANT OF ADMINISTRATION. 3.
—— Joint grant to next of kin and another person entitled in distribution—Consent of persons entitled in distribution - 230
See GRANT OF ADMINISTRATION. 4.

ADMINISTRATION WITH WILL ANNEXED—*Executrix and Sole Legatee not to be found—Grant to Representative of Next of Kin of Testatrix.*] Where a sole executrix and legatee—being the illegitimate daughter of the testatrix—had not been heard of for forty years, the Court granted administration with the will annexed to the representative of the next of kin of the testatrix, on proof that the executrix had been cited by advertisement and that the Solicitor to the Treasury did not intend to apply for administration to her estate, and subject to administration to the next of kin being taken out. IN THE GOODS OF LEY - - - 6

2. —— *Will—Executors resident out of the United Kingdom—Person nominated to act for one of them—Grant of Administration with the Will annexed under s.* 73 *of* 20 & 21 *Vict. c.* 77.] A testator by his will nominated two executors, both of whom at the time of his death were

ADMINISTRATION WITH WILL ANNEXED—*continued.*
resident out of the United Kingdom. The will contained a paragraph requesting H. B. R., the partner of one of the executors, to act for him in the event of his absence. It appeared that there was urgent necessity for the appointment of an administrator of the estate of the deceased:—*Held*, that administration with the will annexed might be granted to H. B. R. under s. 73 of 20 & 21 Vict. c. 77, until such time as one or other of the executors should come and prove the will. IN THE GOODS OF TAYLOR - 90

3. —— *Will—Sole Executrix a Lunatic—Personal Service of Citation dispensed with—Grant to Creditor under s.* 73 *of* 20 & 21 *Vict. c.* 77.] The sole executrix and universal legatee of a deceased testator was his widow. She was a lunatic, and a guardian had been appointed in the Chancery Division to receive certain rents, &c., to which she was entitled. A creditor of the deceased testator applied for a grant of administration with the will annexed, and served a citation on the guardian, who refused to allow personal service on the lunatic;—*Held*, that a grant might be made to the creditor under the 73rd section of 20 & 21 Vict. c. 77, without requiring the lunatic to be personally served. IN THE GOODS OF ATHERTON - - 104

4. —— *Identical Wills of Husband and Wife—Death—Presumption as to Survivorship—Intestacy — Grant of Administration with Will annexed to Next of Kin of each.*] A husband and wife executed identical wills, each appointing the other universal legatee and sole executor,

ADMINISTRATION WITH WILL ANNEXED—*continued.*

and substituting executors in case of the other dying first.—They started together upon a voyage in the same ship, which was supposed to have been lost at sea with all on board. There was no evidence that either of them survived the other:—*Held*, that a grant of administration with the will annexed of the estate of each, as in case of an intestacy, might be made to one of the next of kin of each. IN THE GOODS OF E. D. ALSTON. IN THE GOODS OF G. C. ALSTON 142

5. —— *No known Relatives of Testator, and no residuary Legatee appointed—Grant to a Stranger.*] A testator, by his will, bequeathed a life interest in his estate, which consisted solely of five leasehold houses, to his wife, with remainder to his stepson, whom he nominated his sole executor. The stepson died without having proved the will, and his wife took out administration to his estate. The testator's widow entered into possession, and received the rents of the houses during her life, and by her will bequeathed them to her son C. B., who proved the will. Disputes having arisen as to the interests of other members of the family under a previous will, it was arranged that the stepson's administratrix should take out letters of administration with the will annexed to the estate of the testator and divide the property; but she died before the arrangement could be carried out. The testator had no known relatives, and his will did not appoint a residuary legatee:—*Held*, that under the circumstances a grant of administration with the will annexed to the estate of the testator might be made to C. B. IN THE GOODS OF JACKSON - - 257

BANKER—Inspection of banker's books—Discovery—Sealing up entries - 137
See PRACTICE. 3.

CASES—*Beale* v. *Beale* (Law Rep. 3 P. & D. 179) distinguished - - - 17
See PRACTICE.
—— *Cargill* v. *Cargill* (1 S. & T. 235) approved
See MARRIED WOMAN. [21
—— *Fitzgerald* v. *Fitzgerald* (L. R. 1 P. & D. 694) explained - - - 21
See MARRIED WOMAN.

COSTS—Rule 41 (Contentious Rules of 1862)—Discretion - - - - 17
See PRACTICE.

DEATH—Identical wills of husband and wife—Presumption as to survivorship—Intestacy - - - - - 142
See ADMINISTRATION WITH WILL ANNEXED. 4.

DEATH, PRESUMPTION OF—Foreign grant of Administration - - - 255
See GRANT OF ADMINISTRATION. 5.

DESERTION—Husband and wife—Protection order—Misrepresentation - - 21
See MARRIED WOMAN.

DESTRUCTION OF WILL—Tearing—Incomplete restoration - - - - 82
See GRANT OF PROBATE.

DISCOVERY—Inspection of banker's books—Sealing up entries - - - 137
See PRACTICE. 3.

EVIDENCE—Will—"My nephew J. A."—Legitimate and illegitimate nephews of same name - - - - 83
See GRANT OF PROBATE. 2.
—— Foreign will—Proof of copy - - 89
See PRACTICE. 2.
—— Latent ambiguity—Will - - 247
See GRANT OF PROBATE. 5.

EXECUTION—*Foot or End—Lord St. Leonard's Act* (15 & 16 *Vict. c.* 24), *s.* 1.] The whole of the disposing portion of a will was written on the first side of a sheet of foolscap; the second and third sides were blank; and the attestation clause with the signatures of the testator and the witnesses were on the fourth side:—*Held*, that the will was duly executed. IN THE GOODS OF FULLER - - - - - 377

FOREIGN GRANT—Administration—Presumption of death - - - 255
See GRANT OF ADMINISTRATION. 5.

FOREIGN LAW—Will proved abroad—Probate of copy - - - - 89
See PRACTICE. 2.

GRANT OF ADMINISTRATION—"*Widow, but no Issue*"—*Pauper Lunatic—Grant to Clerk of Guardians under* 20 & 21 *Vict. c.* 77, *s.* 73—*Next of Kin not cited*—53 & 54 *Vict. c.* 29, *s.* 1.] The value of the whole property of an intestate who died leaving a widow but no issue did not exceed 500*l.* The widow was a pauper lunatic, and her father had renounced his right to take the grant on her behalf:—*Held*, that a grant of administration might be made under s. 73 of the 20 & 21 Vict. c. 77, to a person nominated by the guardians of the union to whom the pauper lunatic was indebted for her maintenance without citing the next of kin of the intestate or of the lunatic. IN THE GOODS OF EVERLEY - - - 50

2. —— *Will shewing Insanity—Grant of Administration as in case of an Intestacy—Form of Oath by Administrator.*] A testator while of unsound mind made a will disposing of large sums of money, although at the time of making the will he was possessed of no property whatever and was dependent upon his relatives for support:—*Held*, that administration might be granted as in case of an intestacy to the sister of the deceased as attorney for his widow, who was resident in Australia, and that the oath of the administratrix should be to the effect that the deceased, so far as she knew and believed, had left no will. IN THE GOODS OF A. G. RICH - - - 143

3. —— *Lunatic Widow—Next of Kin unable to find Justifying Security—Grant to Receiver appointed by Chancery Division.*] Upon an application for administration it appeared that the widow of the intestate was a lunatic, and his only other next of kin, his brother, was unable to furnish justifying security. A suit had been instituted in the Chancery Division for the administration of the estate and a receiver appointed; but a portion of the estate, consisting of stock in

GRANT OF ADMINISTRATION—*continued.*

a waterworks company, could not be realized except by a personal representative of the deceased: —*Held*, that administration could not be granted to the brother of the deceased without requiring justifying security, but that a grant might be made to the receiver, to issue when the registrar had been satisfied that the Chancery Division had continued his appointment. IN THE GOODS OF GEORGE MOORE - - - - 145

4. —— *Joint Grant to Next of Kin and Another Person entitled in Distribution—Consent of Persons entitled in Distribution—20 & 21 Vict. c. 77, s. 73.*] A widow died intestate leaving a brother and nine nephews and nieces, the only persons entitled in distribution. Three of her nephews and nieces were in Australia, but, the other six consenting, the Court made a grant of administration to the brother and one of the nephews under 20 & 21 Vict. c. 77, s. 73. IN THE GOODS OF WALSH - - - - 230

5. —— *Presumption of Death—Foreign Grant followed.*] Where a foreign court of competent jurisdiction had made a grant of administration on the presumption of the death of the intestate: —*Held*, that the grant might be accepted by the Court of Probate as sufficient proof of the death without requiring it to be proved by independent evidence. IN THE GOODS OF SPENCELEY - 255

GRANT OF PROBATE—*Torn Will—Incomplete Restoration—Copy—Grant.*] The will of a testator was, after his death, torn into pieces by one of his sons while a copy was being made by the executor. Most of the pieces were recovered and gummed together; but there were still some blanks left, and it was in an incomplete form when presented for probate, though the copy shewed what all the words omitted in the blanks had been:—*Held*, that probate might be granted of the incomplete will and the copy as together constituting the will of the deceased. IN THE GOODS OF LEIGH - - - - 82

2. —— *Will—Construction—Appointment of Executors—"My Nephew G. A."—Legitimate and Illegitimate Nephews of same Name—Extrinsic Evidence.*] A testator by his will appointed four executors, one of whom was described as "my nephew G. A." It appeared that there were two persons named "G. A."—one an illegitimate son of the testator's sister, the other the legitimate son of the testator's brother. The testator also nominated as another of his executors "my nephew E. A.," and it appeared that E. A. was his illegitimate grand-nephew, the son of his illegitimate nephew. He further described as "my niece" a person who was his illegitimate niece:—*Held*, that the language of the will shewed that the testator applied the description of nephew and niece to legitimate and illegitimate relatives indiscriminately; and that the Court was therefore entitled to admit extrinsic evidence for the purpose of shewing that the illegitimate and not the legitimate nephew was intended by the will. IN THE GOODS OF ASHTON - 83

3. —— *Will—Executor according to the Tenor.*] A testatrix appointed A. & B. "trustees" of her will, and expressed her wish that they should pay her funeral and other debts:—

GRANT OF PROBATE—*continued.*

Held, that A. and B. were thereby constituted executors according to the tenor, and entitled to probate. IN THE GOODS OF WILKINSON - 227

4. —— *Will—Codicil—Mistake in Date of Reference.*] A testatrix executed a will in 1887, and a subsequent will in 1889 by which she revoked all previous wills. In 1891 she executed a codicil which by mistake was described as a codicil to the will of 1887:—*Held*, that probate might be granted of the codicil, together with the will of 1889, with the reference to the will of 1887 omitted. IN THE GOODS OF LADY ISABELLA GORDON - - - - - 228

5. —— *Will—Incorporation—Words of Reference—Latent Ambiguity—Parol Evidence.*] A testatrix, by a will executed in 1873, bequeathed the residue of a fund over which, under the will of her brother, she had a power of appointment, to her two daughters, Mrs. B. and Mrs. P., with remainder to their respective husbands and children. She had also previously by deed appointed the residue of another fund between them, and Mrs. P.'s share so appointed was settled on her on her marriage. Mrs. B. predeceased her mother, and by a codicil executed in 1877 the testatrix revoked the bequest to her and her family; but she made no alteration in the bequest to Mrs. P. In 1881, testatrix made another will, which revoked all former wills, and appointed C. O., the defendant in the suit, her residuary legatee. This will contained the following recital: "Whereas I have also settled one undivided moiety of the residue of the said third part of 100,000*l.*, to which I am entitled under the will of my said brother, in favour of my said daughter, E. J. P.":—*Held*, that this recital did not refer to the will of 1873 so as to raise the question whether it incorporated it by reference:—*Held*, further, that there was no such ambiguity as to make declarations by the testatrix of her intention admissible in evidence. PATON *v.* ORMEROD [247

6. —— *Will—Executor according to the tenor.*] Trustees nominated by a testator "to carry out this will," and "for the due execution of this my will"—*Held*, to be thereby constituted executors according to the tenor and entitled to probate. IN THE GOODS OF RUSSELL. IN THE GOODS OF LAIRD - - - - - - 380

—— Nomination of executors written after attestation clause—Erasure after execution *See* INTERLINEATIONS. [7

INSANITY—Will shewing insanity—Grant of administration as in case of an intestacy - - - - - 143
See GRANT OF ADMINISTRATION. 2.

INTERLINEATIONS — *Will — Nomination of Executors written after Attestation Clause—Erasure after Execution—Substituted Executor and Attesting Witness.*] A will contained no nomination of executors in the body of it, but at the bottom, below the attestation clause, were the words, "executors, W. G. and C. S." There was an asterisk before these words and an asterisk before the word "executor" wherever it occurred in the will. It was proved that these words were

INTERLINEATIONS—*continued.*
written before the execution of the will. After the execution, the testator directed the name of C. S., who was an attesting witness as well as executor, to be erased and the name of W. S. to be written over the erasure. The will was not re-executed after these alterations had been made:—*Held*, that the nomination of executors might be included in the probate, but that the name of C. S. must be restored both as executor and attesting witness. IN THE GOODS OF THOMAS GREENWOOD - - - - - 7

2. —— *Will—Codicil—Unattested Interlineations—Incorporation by Reference.*] A testator, after she execution of his will, made various alterations and interlineations, some of which were attested and some unattested. Among the latter was an interlineation giving a legacy of "1000*l.* to each of my executors." In the body of the will he gave a legacy of 10,000*l.* to one of his executors. In a codicil the testator recited that he had given a legacy of 11,000*l.* to this particular person:—*Held*, that this reference shewed that the interlineation had been made prior to the execution of the codicil, and that it was therefore incorporated by it. IN THE GOODS OF G. Y. HEATH - - - - 253

JURISDICTION—Executors resident out of the United Kingdom—Person nominated to act for one of them - - - 90
See ADMINISTRATION WITH WILL ANNEXED. 2.

LOST WILL — *Probate of Codicil.*] Testator executed a codicil which was described as "a codicil to my will executed some years ago." After his death no trace of the will could be found:—*Held*, that probate of the codicil might be granted. IN THE GOODS OF CLEMENTS 254

LUNATIC—Pauper—Grant of administration to clerk of guardians - - - 50
See GRANT OF ADMINISTRATION.

—— Sole executrix—Personal service of citation [104
See ADMINISTRATION WITH WILL ANNEXED. 3.

MARRIED WOMAN — *Will—Desertion—Protection Order—Misrepresentation—Notice to Husband—20 & 21 Vict. c. 85, s. 21.*] A husband left his home on March 2, 1867, with his wife's consent, to seek employment in America. He was absent nearly ten years, and during that time he did not communicate with his wife except by one verbal message, as to the receipt of which there was no evidence. On his return at the end of 1876, he went at once to his wife's house, but she refused to receive him, and shut the door in his face. Next day she went before a police magistrate, and obtained a protection order under s. 21 of 20 & 21 Vict. c. 85, on the ground that her husband had deserted her on March 2, 1867. She did not inform the magistrate that her husband had returned and had offered to resume cohabitation, nor that when he went away he had left her in possession of a furnished lodging-house by which she had earned her livelihood. No notice

MARRIED WOMAN—*continued.*
was given to the husband of the application for the protection order, and he did not know of the existence of the order until it was found among her papers after her death. The husband and wife met occasionally on friendly terms after the date of the order, but they never resumed cohabitation:—*Held*, that the order must be taken to have been obtained by false statements, by the concealment of material facts, and without notice to the husband, and that it was therefore invalid, and must be set aside.—*Cargill* v. *Cargill* (1 S. & T. 235) approved.—*Fitzgerald* v. *Fitzgerald* (L. R. 1 P. & D. 694) explained. MAHONEY *v.* M'CARTHY - - - 21

PRACTICE—*Costs—Rule* 41 (*Contentious Rules of* 1862)—*Discretion.*] Where the party opposing a will has given notice under rule 41 of the Contentious Business Rules of 1862 that he merely insists on the will being proved in solemn form and only intends to cross-examine the witnesses, the Court has no jurisdiction to condemn him in costs, such power only existing where the party giving the notice has taken proceedings to call in the probate.—*Beale* v. *Beale* (Law Rep. 3 P. & D. 179) distinguished. LEIGH *v.* GREEN [17

2. —— *Will proved Abroad—French Law—Probate of Copy.*] The will of a British subject domiciled abroad at the time of his death had been proved in the French Courts and deposited with a notary, who by the law of France was forbidden to allow it to be removed from his custody:—*Held*, that probate might be granted of a copy of the original will properly proved, limited to such time as might elapse before the original itself should be brought in. IN THE GOODS OF LEMME - - - - 89

3. —— *Discovery — Inspection of Banker's Books — Affidavit of Documents — Sealing up Entries — Subpœna duces tecum to produce Banker's Book — Bankers' Books Evidence Act, 1879 (42 & 43 Vict. c. 11), s. 7.*] By the Bankers' Books Evidence Act (42 & 43 Vict. c. 11), s. 3, subject to the provisions of this Act, a copy of any entry in a banker's book shall be received as primâ facie evidence of such entry. By s. 7, on the application of any party to a legal proceeding a Court or a judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings.—The plaintiff in an action for probate having been ordered to produce for inspection documents in her possession relating to the matters in question in the action, produced the pass books of her banking account, sealing up parts of them which were, as she deposed, irrelevant to the matters in issue. Application was thereupon made by the opposite parties for an order authorizing them to inspect the books, or in the alternative for leave to issue a subpœna duces tecum to the officers of the bank for their production:—*Held*, that the application could not be granted, for there was nothing in the Act to deprive a party to a legal proceeding of his right to refuse discovery of entries in his banker's books on the ground that they were irrelevant, and that whether the sub-

PRACTICE—*continued.*
pœna duces tecum should be granted was a matter which ought to be left for the determination of the judge at the trial. PARNELL *v.* WOOD - - - - - - C. A. 137
—— Will denoting insanity—Grant of administration—Form of oath - - 143
See GRANT OF ADMINISTRATION. 2.

PROTECTION ORDER — Misrepresentation — Notice to husband - - - 21
See MARRIED WOMAN.

REVOCATION—*Will—Codicil—Words of Revocation included in Will without the Knowledge of Testatrix—Omission.*] A testatrix by her will constituted her illegitimate son her universal legatee and one of her executors. After the execution of the will, and shortly before her death, she expressed a wish to bequeath part of her furniture and other personal effects to her sister, her sole next of kin and heiress-at-law, and proceeded to write out a bequest giving effect to such wish on a printed form of will, which was duly executed. The form commenced by a clause of revocation; but the testatrix did not fill up the blanks in this part of the form; and the clause was not read over to her at the time of execution, though the rest of the will was, and there was no evidence that she knew of such clause:—*Held*, that, under the circumstances, probate might be granted of the paper, omitting the clause of revocation, as a codicil to the original will. IN THE GOODS OF MOORE 378

STATUTES:—
15 & 16 Vict. c. 24, s. 1 - - - 377
See EXECUTION.
20 & 21 Vict. c. 77, s. 73 - - - 50
See GRANT OF ADMINISTRATION.
—— —— —— - - - - 90
See ADMINISTRATION WITH WILL ANNEXED. 2.
—— —— —— - - - - 104
See ADMINISTRATION WITH WILL ANNEXED. 3.

STATUTES—*continued.*
20 & 21 Vict. c. 77, s. 73 - - - 230
See GRANT OF PROBATE. 4.
20 & 21 Vict. c. 85, s. 21 - - - 21
See MARRIED WOMAN.
42 & 43 Vict. c. 11, ss. 6, 7 - - 137
See PRACTICE. 3.
53 & 54 Vict. c. 29, s. 1 - - - 50
See GRANT OF ADMINISTRATION.

STRANGER — Grant to — Administration with will annexed - - - 257
See ADMINISTRATION WITH WILL ANNEXED. 5.

WILL—Construction—My nephew G. A.—Legitimate and illegitimate nephews of same name—Extrinsic evidence - 83
See GRANT OF PROBATE. 2.
—— Tearing—Incomplete restoration - 82
See GRANT OF PROBATE.
—— Sole executrix a lunatic—Personal service of citation dispensed with - 104
See ADMINISTRATION WITH WILL ANNEXED. 3.
—— Executor according to the tenor - 227
See GRANT OF PROBATE. 3.
—— Executor according to tenor - - 380
See GRANT OF PROBATE. 6.
—— Codicil—Mistake in date of reference 228
See GRANT OF PROBATE. 4.
—— Incorporation—Words of reference—Latent ambiguity—Parol evidence - 247
See GRANT OF PROBATE. 5.
—— Latent ambiguity—Parol evidence - 247
See GRANT OF PROBATE. 5.
—— Codicil—Unattested interlineations—Incorporation by reference - - 253
See INTERLINEATIONS. 2.
—— Disappearance—Probate of codicil - 254
See LOST WILL.
—— Signature—End of will - - 377
See EXECUTION.

WORDS:—"Widow, but no issue" - 50
See GRANT OF ADMINISTRATION.

DIVORCE.

ALIMONY — *Judicial Separation on Ground of Wife's Cruelty—20 & 21 Vict. c. 85, s. 17.*] The Ecclesiastical Courts had power to grant permanent alimony to a wife who was divorced a mensâ et thoro on account of her misconduct, and that power is not taken away from the Divorce Court by the 20 & 21 Vict. c. 85, s. 17. The Court therefore has now jurisdiction to grant permanent alimony to a wife against whom a decree of judicial separation has been made on account of her misconduct, and has also the power from time to time to vary such order.—Decision of Jeune, J. ([1891] P. 395) affirmed. GOODDEN *v.* GOODDEN - C. A. 1

2. —— *Husband's Petition—Application for Alimony pendente lite — Insufficiency of Answer — Partnership Accounts — Cross-examination of*

ALIMONY—*continued.*
Husband—Further and fuller Answer ordered—Rule 191 *of Divorce Court Rules.*] In a petition by the husband for the dissolution of the marriage, the wife applied for an allotment of alimony pending suit. The husband in his answer admitted that his income from his business amounted to 3000*l.* a year, but objected to produce the books of the business before the registrar on the ground that they would disclose the accounts of the partnership:—*Held*, that the husband's answer was incomplete, and that he must file a fuller and further answer; but that he ought not at then existing stage of the proceedings to be ordered to file accounts and to attend for the purpose of being cross-examined upon them. TONGE *v.* TONGE - - 51

APPEAL—Court of Appeal—Costs—Discretion of Court - - - - 152
See PRACTICE. 4.

CASES:—*Pomero* v. *Pomero and Hadley* (10 P. D. 174) followed - - - 375
See PRACTICE.

CHILDREN—Maintenance - - - 148
See SETTLEMENTS.

COMMISSION—Witnesses examined by foreign tribunal—Injunction - - 98
See JURISDICTION.

CONDONATION—Divorce—Husband's petition—Dismissal of petition—Second petition
See PRACTICE. [375

—— Cruelty—Revival—Discretionary bar 382
See PRACTICE. 2.

COSTS—Variations of Settlements—Sum paid out of settled fund to pay the balance of costs due - - - - 147
See PRACTICE. 3.

—— Divorce—Wife's costs—Enforcing bond—Discretion of Court as to costs—Appeal
See PRACTICE. 4. [152

—— Legitimacy Declaration Act—Intervener—Attorney-General - - - 217
See LEGITIMACY DECLARATION ACT.

—— Co-respondent condemned in costs—Death of co-respondent before payment of costs—Petitioner appointed receiver of his estate - - - - 226
See PRACTICE. 5.

—— Divorce—Co-respondent dismissed from suit—Co-respondent out of jurisdiction 245
See JURISDICTION. 3.

—— Legitimacy, declaration of—Intervener 261
See LEGITIMACY DECLARATION ACT. 2.

DELAY—Delay in moving to make decree absolute—Power of Court to dismiss the petition - - - - 212
See PRACTICE. 6.

DOMICIL—Divorce—Jurisdiction - - 240
See JURISDICTION. 2.

—— Matrimonial home—Scotch divorce—English marriage—Collusion - - 402
See JURISDICTION. 4.

INSANITY — *Husband's Petition — Insanity of Wife.*] In a petition by the husband for a dissolution of the marriage on the ground of the wife's adultery, the guardian ad litem of the wife, who was insane at the time of the presentation of the petition, pleaded that if she had committed adultery she was not of sound mind or responsible for her actions at the time, and that she was incapable of understanding the guilty nature of her acts, and legally incompetent to consent to them:—*Held*, that though the wife might have been subject to insane delusions on some points, if at the time she committed adultery she was capable of appreciating the nature of the act and its probable consequences, her insanity was not a defence to the petition.—*Quære*, whether such insanity as would entitle the defendant in an indictment for a criminal offence to an acquittal would constitute a valid answer to a suit for divorce on the ground of adultery. YARROW *v.* YARROW - - 92

2. —— *Divorce—Insanity, how far a Defence.*] By Sir Charles Butt (President):—Assuming that insanity can in any case afford a defence to proceedings for divorce, it is necessary, in order to make insanity a good plea to a petition for divorce, that the plea should state that the insanity is lasting and abiding, and that there is no hope of recovery or amelioration, and not that it is a mere recurrent or intermittent insanity. And where it appears that a husband who returns to the conjugal home after a period of confinement in an asylum is subject to recurring fits of mania, which, though they may assume the form of hereditary disease, endanger the safety of the wife, she is entitled to the protection of the Court by the grant of a judicial separation:—*Quære*, whether insanity can, under any circumstances, afford a defence to a petition for divorce. HANBURY *v.* HANBURY - - - - 222

INTERVENER — Divorce — Decree absolute — Title of suit - - - 102
See PRACTICE. 7.

JACTITATION OF MARRIAGE—*Practice—Trial by Jury—Undefended Suit.*] It is not the practice of the Court to order a suit of jactitation of marriage to be tried by a jury if the defendant has put in no defence. THOMPSON *v.* ROURKE [C. A. 244

JUDICIAL SEPARATION — Cruelty of wife — Alimony - - - - 1
See ALIMONY.

JURISDICTION—*Act on Petition—Commission to examine Witnesses—Witnesses examined by Foreign Tribunal — Injunction.*] In a petition by the husband for a dissolution of marriage on the ground of the wife's adultery, the co-respondent filed an act on petition denying the jurisdiction of the Court. The petitioner had obtained an order for a commission to examine witnesses in Vienna, which was suspended pending the hearing of the act on petition; but in the meantime he applied to the Court at Vienna, acting, as was alleged, under the provisions of the Austrian Code for the perpetuation of evidence, to summon witnesses before it, and examine them on oath.—The Court, on the application of the respondent, made an order restraining the petitioner from further prosecuting the proceedings before the Court at Vienna. ARMSTRONG *v.* ARMSTRONG 98

2. —— *Domicil—Jurisdiction.*] In a petition by the wife for divorce, on the ground of the husband's adultery and desertion, it appeared that both husband and wife were born in France, of parents born in England but resident in France. The marriage took place in England, but the husband and wife subsequently resided in France. The respondent, on coming of age, made a declaration of his intention to retain his English nationality, and it also appeared that both he and his father contemplated returning to England when they had made sufficient money to maintain them. The respondent, after deserting his wife, led an unsettled life in New Zealand

JURISDICTION—*continued.*

and the Australian Colonies:—*Held*, that both parties had an English domicil at the commencement of the proceedings, and that the Court, therefore, had power to entertain the petition and to dissolve the marriage. GOULDER *v.* GOULDER [240

3. —— *Co-respondent out of Jurisdiction—Co-respondent dismissed from the Suit—Costs.*] A co-respondent, after entering an appearance unconditionally, filed an answer alleging that his domicil was German; that the adultery charged, if committed at all, was committed in Germany, and that the citation had been served on him in the United States, and claiming to be dismissed from the suit:—*Held*, that the co-respondent might be dismissed from the suit; but that as he had not taken the earliest opportunity of disputing the jurisdiction, he was entitled only to his costs of appearance GRANGE *v.* GRANGE 245

4. —— *Nullity—Domicil—Matrimonial Home—Scotch Divorce—English Marriage—Collusion—Fraudulent Misrepresentation.*] A petition by the husband for divorce in this Court having been dismissed with costs against the petitioner, the co-respondent in the suit consulted a solicitor in Scotland with the view of commencing proceedings for obtaining a divorce in the Court of Session. The solicitor communicated with the petitioner, and ultimately, acting as the agent of all parties, commenced a suit for divorce in the Court of Session. The domicil of all the parties was English; but, in order to found jurisdiction, the respondent and co-respondent cohabited at Ayr, and an office was taken for the petitioner in Glasgow as a tea merchant; but no business was done there, and he was actually only in Scotland three times for a day and a night on each occasion. All possible steps were taken to conceal the real facts from the knowledge of the Court of Session. The co-respondent was described by a name which was not his own, neither he nor the respondent put in any answer to the suit, and the petitioner swore in his oath de calumnia that there was no collusion between the parties. All the expenses, including the petitioner's travelling expenses, were paid by the co-respondent.—The Court of Session having pronounced a decree of divorce, the respondent and co-respondent went through a ceremony of marriage at the Isle of Man:—*Held*, on a petition to declare this marriage null and void, that the Court of Session had no jurisdiction to dissolve the first marriage, and that the second marriage was therefore invalid. BONAPARTE *v.* BONAPARTE (OTHERWISE MEGONE) - - - - - 402

—— Divorce—Domicil - - - 240
See JURISDICTION. 2.

LEGITIMACY DECLARATION ACT—*Practice—Intervener condemned in Costs of Petitioner—Refusal to allow Costs of Attorney-General—20 & 21 Vict. c. 85, s. 51—Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), ss. 4, 5, 11.*] In a petition under the Legitimacy Declaration Act, the person alleged to be the father of the petitioner was cited, obtained leave to intervene, and became a party to the suit. He gave evidence against the petitioner denying that she was his

LEGITIMACY DECLARATION ACT—*continued.*

daughter. — The Court having found all the issues in favour of the petitioner, condemned the intervener in her costs, but refused to give costs to the Attorney General. BAIN *v.* ATTORNEY-GENERAL - - - - - 217

2. —— *Costs — Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), ss. 4, 5, 7, 8, 11.*] In proceedings under the Legitimacy Declaration Act, 1858, the Court has jurisdiction to order a person who has been cited, and has appeared and opposed the petition, to pay the costs of the petitioner.—Decision of the President [1892] P. 217, affirmed. BAIN *v.* ATTORNEY GENERAL [C. A. 261

MISCONDUCT OF PETITIONER—*Wife's Petition—Husband found Guilty of Adultery, but not of Cruelty—Desertion by Wife without Reasonable Excuse—Decree for Judicial Separation—Practice of Ecclesiastical Courts—20 & 21 Vict. c. 85, s. 31.*] In a petition by the wife for the dissolution of the marriage on the ground of adultery and cruelty, the husband in his answer charged his wife with adultery and with having deserted him without reasonable excuse. The jury found that the husband had been guilty of adultery but not of cruelty, and that the wife had not committed adultery. It appeared that the petitioner had separated herself from the respondent before his adultery.—*Held*, that the petitioner was entitled to convert her petition for divorce into a petition for judicial separation, and that her desertion of her husband before his adultery was not a bar to the granting of a decree of judicial separation. DUPLANY *v.* DUPLANY - 53

NULLITY—Collusion—Domicil—Scotch divorce—English marriage - - 402
See JURISDICTION. 4.

PRACTICE—*Husband's Petition — Dismissal of Petition — Condonation — Second Petition — Damages.*] A husband having presented a petition for divorce charging his wife with adultery with a named co-respondent, condoned the offence and allowed the petition to be dismissed. Subsequently he presented a second petition charging his wife with adultery with a second co-respondent, and obtained leave to amend such petition by adding to it the charges in the petition against the first co-respondent, which had been dismissed, by inserting a claim for damages against him; and by making him a co-respondent:—*Held*, on motion to dismiss the first co-respondent from the suit that the condonation was no bar to the claim for damages.—*Pomero* v. *Pomero and Hadley* (10 P. D. 174) followed. BERNSTEIN *v.* BERNSTEIN, SAMPSON, AND TURNER - - - 375

2. —— *Wife's Petition—Decree Nisi not made Absolute—Petitioner married again—Resumption of Cohabitation with Respondent—Condonation—Cruelty — Revival — Discretionary Bar — Decree Absolute—20 & 21 Vict. c. 85, s. 30.*] In a petition by the wife for a divorce on the ground of adultery and cruelty, a decree nisi was pronounced; but no steps were taken to make it absolute. The petitioner believing that the marriage was dissolved at the end of six months,

PRACTICE—*continued.*

went through a form of marriage with a man with whom she cohabited for some years until he died. She then resumed cohabitation with the respondent; but he was guilty of cruelty towards her, and she left him after living with him a year and nine months:—*Held*, upon an application by the petitioner to make the decree nisi absolute, the Queen's Proctor intervening, that there was nothing in the circumstances to prevent the cruelty of which the respondent had been guilty during the second cohabitation from reviving the matrimonial offences on the ground of which the decree nisi had been pronounced, and that inasmuch as it must be taken that she went through the form of marriage with another person in the honest belief that her marriage with the respondent was dissolved, the Court was entitled to make the decree nisi absolute. MOORE *v.* MOORE - - - - - - 382

3. —— *Wife's Petition—Costs—Variation of Settlements—Sum paid out of Settled Fund to pay the balance of Costs due*—22 & 23 *Vict. c.* 61, *s.* 5.] In a petition by the wife a decree was pronounced dissolving the marriage, and condemning the respondent in costs. The respondent could not be found after the making of the decree, and there was no prospect of recovering the costs from him. Upon an application for variation of the marriage settlement, it appeared that the husband had brought nothing into the settlement:—*Held*, that part of the funds included in the settlement might be applied to satisfy the balance still remaining unpaid of the costs of the suit and of the petition for the variation of settlements. HIPWELL *v.* HIPWELL - - - - 147

4. —— *Wife's Costs—Security—Husband's Bond to Wife's Solicitor—Enforcing Bond—Discretion of Court as to Costs—Appeal—Divorce Court Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 51—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 49—*Appellate Jurisdiction Act*, 1876 (39 & 40 *Vict. c.* 59), *s.* 20—*Divorce Court Rules*, 158, 159, 199, 201.] In a petition by the wife for judicial separation, her solicitor has no greater right than his client to recover costs from the opposite party. Where, therefore, a petition by the wife for judicial separation had been dismissed with costs:—*Held*, that the solicitor of the petitioner could not enforce against the respondent the bond executed by the respondent, under rule 158 of the Divorce Court Rules, as security for the petitioner's costs of the trial.—Under s. 51 of the Divorce Act, 1857, the costs of any suit or proceeding under the Act are in the discretion of the Court.—Where, therefore, the Court has, in the exercise of its discretion, refused an application under rule 199 of the Divorce Court Rules to allow the bond given by the husband to the wife's solicitor under rule 158 to be enforced, the Court of Appeal is precluded by s. 49 of the Judicature Act, 1873, and s. 20 of the Appellate Jurisdiction Act, 1876, from reviewing such decision RUSSELL *v.* RUSSELL - **C. A. 152**

5. —— *Co-Respondent condemned in Costs—Death of Co-Respondent before Payment of Costs—Petitioner appointed Receiver to his Estate—Order XVII., r.* 4; *Order XLII., r.* 28.] In a petition by a husband for divorce, a decree absolute had been pronounced and the co-respondent condemned in the costs of the petition. An arrangement was subsequently made by which the co-respondent undertook to pay the amount of the costs by instalments; but he died intestate before the whole of such instalments had been paid. Immediately after his death an order was made restraining his widow from dealing with his estate.—The Court, under Order XVII., r. 4, and Order XLII., r. 28, appointed the petitioner receiver of the co-respondent's estate, but directed that the order should not be drawn up for a week, in order that the widow of the co-respondent might decide whether she would take out administration and give security for the debt. WADDELL *v.* WADDELL AND CRAIG - - 226

6. —— *Wife's Petition—Decree Nisi—Delay in moving to make the Decree Absolute—Application by Respondent—Power of Court to dismiss the Petition.*] In a suit by the wife for dissolution of the marriage, the petitioner obtained a decree nisi, but allowed more than a year to elapse without taking any further step to make such decree absolute:—*Held*, on an application by the respondent to make the decree absolute or to dismiss the petition for want of prosecution, that the petition must be dismissed unless within a week the petitioner applied to make the decree absolute. LEWIS *v.* LEWIS - - - - 212

7. —— *Intervener—Decree Absolute—Variation of Settlements—Title of Suit.*] In a petition by the wife for dissolution of the marriage on the ground of adultery and cruelty, one of the persons with whom the husband was alleged to have committed adultery obtained leave to intervene, and her name was added to the title of the suit. Subsequently she obtained an order for a commission to examine witnesses abroad, and for the postponement of the trial of the issues affecting her until the return of the commission.—The petitioner obtained a decree absolute, on evidence which satisfied the Court that the respondent had committed adultery with women other than the intervener; and the issue affecting her was never tried:—*Held*, on a subsequent petition for variation of settlements, that the name of the intervener must be struck out of all pending and future proceedings. CONNEMARA *v.* CONNEMARA [102

8. —— *Settlement of Wife's Property—Inquiry before Final Decree—Jurisdiction—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 45—*Matrimonial Causes Act*, 1859 (23 & 24 *Vict. c.* 144), *s.* 6—*Rules of Divorce Court, r.* 95.] By the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 45, in any case in which the Court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, if it shall be made appear to the Court that the wife is entitled to any property either in possession or reversion, it shall be lawful for the Court, if it shall think proper, to order such settlement as it shall think reasonable to be made of such property, or any part thereof, for the benefit of the innocent party and of the children of the marriage:—*Held*, that the Court has jurisdiction before pronouncing a final decree for dissolution of marriage, or judicial separation, against a wife for adultery, to direct an inquiry as to her property, so that it

PRACTICE—*continued.*
may be enabled to order a settlement to be made of such property as soon as the final decree is pronounced.—In making such an order the Court will direct the husband to give security for the costs of the inquiry, in case no final decree should be made. MIDWINTER *v.* MIDWINTER **C. A. 28**
—— Alimony—Judicial separation on ground of wife's cruelty - - - 1
See ALIMONY.
—— Alimony—Husband's petition—Insufficiency of answer by husband - - 51
See ALIMONY. 2.
—— Insanity of wife—Husband's petition 92
See INSANITY.
—— Jactitation of marriage—Trial by jury—Undefended suit - - - 244
See JACTITATION OF MARRIAGE.
—— Jurisdiction—Act on petition—Commission to examine witnesses - - 98
See JURISDICTION.

RULES:—
—— Order XVII., r. 4 - - - 226
See PRACTICE. 5.
—— Order XLII., r. 28 - - - 226
See PRACTICE. 5.

SETTLEMENTS — *Maintenance of Children* — 20 & 21 *Vict. c.* 85, *s.* 35—22 & 23 *Vict. c.* 61, *s.* 4.] The Court has no power to make provision for the maintenance of children above the age of sixteen years. BLANDFORD *v.* BLANDFORD 148
—— Wife's property—Inquiry before final decree —Jurisdiction - - - 28
See PRACTICE. 8.

SETTLEMENTS, VARIATION OF—Title of suit —Intervener - - - 102
See PRACTICE. 7.

STATUTES:—
20 & 21 Vict. c. 85, s. 30 - - - 382
See PRACTICE. 2.
—— —— s. 31 - - - - 53
See MISCONDUCT OF PETITIONER.
—— —— s. 35 - - - - 148
See SETTLEMENTS.
—— —— s. 45 - - - - 28
See PRACTICE. 8.
—— —— s. 51 - - - - 152
See PRACTICE. 4.
—— —— —— - - - - 217
See LEGITIMACY DECLARATION ACT.
21 & 22 Vict. c. 43, ss. 4, 5, 7, 8, 11 - - 261
See LEGITIMACY DECLARATION ACT. 2.
21 & 22 Vict. c. 93, ss. 4, 5, 11 - - 217
See LEGITIMACY DECLARATION ACT.
22 & 23 Vict. c. 61, s. 4 - - - 148
See SETTLEMENTS.
—— —— s. 5 - - - - 147
See PRACTICE. 3.
23 & 24 Vict. c. 144, s. 6 - - - 28
See PRACTICE. 8.
36 & 37 Vict. c. 66, s. 49 - - - 152
See PRACTICE. 4.
39 & 40 Vict. c. 59, s. 20 - - - 152
See PRACTICE. 4.

VARIATION OF SETTLEMENTS — Divorce — Maintenance of children - - 148
See SETTLEMENTS.

ADMIRALTY.

AGENT—Salvage—Services rendered by agent —Authority to incur expenses—Principle upon which award based - 366
See SALVAGE. 7.

APPORTIONMENT—Salvage—Agreement to accept percentage of salvage - 337
See SALVAGE. 6.

CASES—*Dunstanborough, The* ([1892] P. 363) distinguished - - - 361
See COLLISION. 10.
—— *Marpesia, The* (Law Rep. 4 P. C. 212) approved - - - 179, 419
See COLLISION. 2, 11.
—— *Scotia, The* (6 Asp. M. L. C. 541) distinguished - - - - 361
See COLLISION. 10.

CHARTERPARTY—*Demurrage*—"*Steamer to be discharged as fast as she can deliver*"—*Custom for Dock Company to discharge Cargo.*] By charterparty between the plaintiffs, shipowners, and the defendants, charterers, it was agreed

CHARTERPARTY—*continued.*
that the plaintiffs' steamer should proceed with the defendants' cargo to the Albert, Stanley, or Wapping Dock, Liverpool, as ordered, "Steamer to be discharged as fast as she can deliver."—The vessel was ordered to the Albert Dock. She arrived there at 6 A.M. on a Monday, and the master handed to the dock company a copy of the manifest of the cargo, together with a request and authority to discharge the cargo, and deliver it to the order of the consignees.—As the berths around the dock were occupied, the vessel was moored, under the direction of the dock officials, alongside another steamer, and there remained until she could be hauled into a quay berth at midday on Thursday.—It was customary at that dock for the whole of the discharge to be done by the dock company's servants at the quay; but owing to the quay being crowded with other cargo, the discharge was not commenced until Saturday, and (the intermediate days being Sunday and Bank Holiday) was not resumed until the following Tuesday. It was completed by 3 P.M. on the Wednesday, being the tenth day from the

CHARTERPARTY—*continued.*
arrival of the vessel in the dock.—The discharge, under ordinary circumstances, would occupy two days.—In an action for demurrage:—*Held*, that the defendants were not liable, as the whole operation of the discharge was, by the custom of the dock, carried out by the dock company's servants at the quay, and the plaintiffs had failed to make out any breach of the contract to discharge as fast as the ship could deliver. THE JAEDEREN - - - - - - 351

2. —— *Printed and Written Clauses—Cargo to be "taken from alongside the ship at merchant's risk and expense"—Cargo to be discharged "according to the custom" of Port—Exclusion of Evidence of Custom throwing Expense on Shipowner.*] By charterparty between the plaintiffs, shipowners, and the defendants, charterers, it was agreed that the plaintiffs' steamer should load a cargo of deals for the defendants: "The cargo to be brought to and taken from alongside the ship at merchant's risk and expense, where she can lie always afloat and safe" . . . . "and being so loaded shall therewith proceed to Yarmouth, Norfolk, or so near thereunto as she may safely get, and deliver the same always afloat . . . ." —The following clause was in writing: "The cargo to be supplied as fast as steamer can load and stow same, and discharged as fast as steamer can deliver, and according to the custom of the respective ports . . . ."—On arrival at Great Yarmouth the vessel was moored fifteen feet from the quay edge, which was as near to the port as the vessel could lie always afloat, and in consequence 9*d.* per standard extra cost was incurred in the discharge.—In an action by the plaintiffs to recover this amount, the judge of the Yarmouth county court gave judgment for the defendants, holding, on the authority of *Scrutton* v. *Childs* (3 Asp. Mar. L. C. 373), that the written prevailed over the printed clause, and he admitted evidence of a custom that the shipowner must deliver on the quay; and, therefore, bear the extra cost of the discharge between the ship's rail and the quay. He also admitted telegrams and letters alleged to indicate the intention of the parties as to the construction of the contract. —The plaintiffs appealed:—*Held*, by the Divisional Court, that judgment must be reversed on the ground that the evidence as to the custom was improperly admitted, as the two clauses were not inconsistent, the clause as to the cargo being "taken from alongside the ship at merchant's risk and expense," dealing with the cost of the discharge, whilst the clause as to delivery "according to the custom," dealt with the time and mode of the discharge:—*Held*, also, that the correspondence between the parties was inadmissible, as there was no ambiguity in the contract. THE NIFA - - - - - 411

COLLISION—*Vessel at Anchor—Inevitable Accident—Steam Steering Gear—Latent Defect—Reasonable Care and Skill—Burden of Proof—Practice—Evidence of Negligence.*] In an action of damage by collision, the plaintiffs, in their statement of claim, in substance alleged that their vessel was at anchor, when the defendants' steamer ran into her in broad daylight.—The defendants, in their pleading, made no charge of

COLLISION—*continued.*
negligence against the plaintiffs, but alleged that the collision was caused by the steering gear of their vessel not acting in consequence of some latent defect or obstruction, which could not have been ascertained or prevented by the exercise of any reasonable care or skill on their part, and that the collision and damage were caused by inevitable accident:—*Held*, that the onus to disprove negligence lay on the defendants, and, therefore, that they must begin.—At the hearing, the defendants proved that the steam steering gear used was good of its kind, that it had been tried before the vessel left her anchorage to proceed on her voyage, that it was found to be in good order, that it had not previously failed to act, and that the cause of the defect in the machine, or obstruction in the working, could not be discovered by competent persons:—*Held*, that the defendants were not liable to the plaintiffs for the damages occasioned by the collision, as they had satisfied the onus of proof cast upon them to disprove negligence, and were not bound to go further and shew what was the cause of the defect or obstruction. THE MERCHANT PRINCE 9

2. —— *Vessel at Anchor — Steam Steering Gear—Inevitable Accident—Burden of Proof.*] In an action of damage by collision, it appeared that the plaintiffs' vessel was at anchor in the Mersey when the defendants' steamer ran into her in broad daylight.—The defence was that the steam steering gear of the defendants' vessel failed to act in consequence of some latent defect, or obstruction, which could not have been ascertained or prevented by the exercise of any reasonable care or skill on the part of the defendants, and that the collision and damage were caused by inevitable accident.—The steam steering gear in question was good of its kind; it had never previously failed to act, and the cause of the defect in the machine, or of the obstruction in the working, could not be discovered by competent persons. Part of the gear, including some portion of the chain, running between the wheel and the rudder, had been recently renewed, and it was admitted that new chain is liable to stretch, but it was proved that before the vessel left her anchorage to proceed on her voyage, the whole of the gear had been tested and found in good order, and that the chain had been tightened up as occasion seemed to require:—*Held*, by the Court of Appeal (reversing the decision of the President, [1892] P. 9), that the defendants were liable, as they had not satisfied the burden of proof, for, in order to support the defence of inevitable accident, and disprove the primâ facie evidence of negligence, it was necessary for them to shew that the cause of the accident was one not produced by them, and the result of which they could not avoid, but the defendants knew of the tendency of new chain to stretch, and therefore that an accumulation of links at the leading wheels might possibly cause jamming, and, considering the crowded condition of the river where the accident occurred, the use—or readiness for immediate use—of hand, instead of steam, steering gear, was a means by which the result could have been avoided.—*Per* Fry, L.J.: The defendants had failed to sustain the plea of

COLLISION—*continued.*
inevitable accident, as it was necessary for them either to shew what was the cause of the accident, and that though exercising ordinary care, caution, and maritime skill, the result of that cause was unavoidable, or to enumerate all the possible causes, one or other of which might have produced the effect, and shew with regard to every one, that the result was unavoidable.—The definition of inevitable accident in *The Marpesia* (Law Rep. 4 P. C. 212) approved. THE MERCHANT PRINCE - - **C. A. 179**

3. —— *Duty of Steamer before entering Fog—Speed of Sailing Vessel in Fog—Sea Collision Rules, art.* 12 (*a*), *art.* 13.] By art. 12 (*a*) of the Regulations for Preventing Collisions at Sea, a steamship is required to whistle "in fog." By art. 13, "A sailing ship or steamship shall in a fog . . . go at a moderate speed."—A collision occurred between a steamer and a sailing vessel, about five to six miles S.W. of the Longships in the English Channel. Immediately before the collision the steamer was proceeding S.W. b. S. at the rate of eight or nine knots, and approaching a bank of fog, in which the sailing ship was, but did not sound her whistle, or reduce her speed. The sailing vessel (a barque) was heading N.N.W. with a moderate south-easterly breeze of force between three and four, and, under all plain sail, except her mainsail, spanker, and light sails, was making about four knots an hour. In an action of damage by collision:—*Held*, that the steamer was to blame for excessive speed, and that, though it was not an infraction of the terms of arts. 12 (*a*), 13, she ought as a matter of precaution to have whistled on approaching the fog, and also to have reduced her speed:—*Held*, also, that the sailing vessel had not infringed art. 13, as, considering the locality, she was not proceeding at a rate of speed beyond what was necessary to keep her well under command. THE N. STRONG - - - - - - **105**

4. —— *Compulsory Pilotage — Draught of Water—Merchant Shipping Act*, 1854, *ss.* 2, 388—*Order in Council, May* 1, 1855, *Regulation* 4—*Practice—Costs.*] By s. 388 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), "No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law." By the interpretation clause (s. 2) of the Act, the words "qualified pilot" shall "mean any person duly licensed by any pilotage authority to conduct ships to which he does not belong." By the 4th of the Regulations approved by, and annexed to, the Order in Council, May 1, 1855, "No person licensed as a pilot for the London district . . . . shall take charge as such of any ship drawing more than fourteen feet water, in the river Thames or Medway, or any of the channels leading thereto or therefrom, until such person shall have acted as a licensed pilot for three years, and shall have been after such three years, on re-examination, approved of in that behalf by the said Trinity House, on pain of forfeiting 10*l.* for every such offence, unless there shall be no qualified pilot to be obtained who has passed the said examination for ships drawing more than fourteen feet water."—In an action of damage by collision the defendants denied that the collision (which took place in the London district) had been caused, or contributed to, by the negligent navigation of their vessel by themselves or their servants, and alleged that the negligence, if any, was that of the pilot, whose employment was compulsory, and they counter-claimed for damages for the alleged negligent navigation of the plaintiffs' vessel.—The Court found that the collision was caused solely by the negligence of the pilot of the defendants' vessel.—The pilot was not licensed to take charge of a vessel drawing more than fourteen feet water, and the draught of water of the defendants' vessel exceeded that depth; but it was admitted that, when the pilot went on board, there was no pilot to be obtained licensed to conduct ships drawing more than fourteen feet:—*Held*, that the Order in Council, taken in conjunction with the other enactments, qualified the pilot pro hac vice to conduct ships of a greater draught than fourteen feet.—The plea of compulsory pilotage was therefore sustained, the plaintiffs' action dismissed, each party bearing their own costs; but the defendants were ordered to pay any costs occasioned by their counter-claim. THE CARL XV. - **132**

5. —— *Compulsory Pilotage — Draught of Water—Merchant Shipping Act*, 1854, *ss.* 2, 388—*Order in Council, May* 1, 1855, *Regulation* 4.] By s. 388 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), "No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship, within any district where the employment of such pilot is compulsory by law."—By the interpretation clause (s. 2) of the Act, the words "qualified pilot" shall "mean any person duly licensed by any pilotage authority to conduct ships to which he does not belong."—By the 4th of the Regulations approved by, and annexed to, the Order in Council, May 1, 1855, "No person licensed as a pilot for the London district . . . . shall take charge as such of any ship drawing more than fourteen feet water, in the river Thames or Medway, or any of the channels leading thereto or therefrom, until such person shall have acted as a licensed pilot for three years, and shall have been after such three years, on re-examination, approved of in that behalf by the said Trinity House, on pain of forfeiting 10*l.* for every such offence, unless there shall be no qualified pilot to be obtained who has passed the said examination for ships drawing more than fourteen feet water."—In an action of damage by collision, the Court found that the collision, which took place in the London District, between the plaintiffs' vessel and the defendants' vessel, was caused solely by the negligence of the pilot of the defendants' vessel.—The defendants' vessel—a foreign ship, with passengers—drew sixteen feet nine inches aft; but the pilot was not licensed to take charge of a vessel drawing more than fourteen feet water. It was, however, admitted that, when the pilot boarded the vessel, no

COLLISION—*continued.*

pilot qualified for vessels drawing more than fourteen feet was left for service:—*Held*, by the Court of Appeal—affirming the judgment of the President ([1892] P. 132)—that the defendants' plea of compulsory pilotage must be sustained, as the effect of the clause in the Order in Council—"unless there shall be no qualified pilot to be obtained who has passed the said examination for ships drawing more than fourteen feet water"—when read into the license, and by the light of the Act of Parliament, was to render the pilot qualified, and his employment compulsory.—*Semble*, a pilot qualified to conduct ships drawing more than fourteen feet water would have a right to supersede the pilot in charge who was not so qualified; but the latter would be entitled to a fair proportion of the pilotage fees. THE CARL XV. [C. A. 342

6. —— "*Not under command*"—*Sea Collision Rules, art.* 5, *sub-ss.* (*a*), (*c*), (*d*).] By art. 5 of the Regulations for Preventing Collisions at Sea, sub-s. (*a*), a steamship "which from any accident is not under command, shall at night carry," in place of the white light, "three red lights in globular lanterns." By sub-s. (*c*), such a steamship "when making way" shall carry the side lights. By sub-s. (*d*), the lights so "required to be shewn . . . . are to be taken by other ships as signals that the ship shewing them is not under command, and cannot therefore get out of the way."—Owing to an accident to her machinery, the speed of a steamship was reduced from eleven knots to three or four knots; but at that speed she retained her power of steering, though she might not be able to reverse as quickly as before. She hoisted three red lights in place of the white light, and the red side light was not exhibited till the moment of collision with another vessel:—*Held*, by the Court of Appeal (affirming the decision of Jeune, J. [1891] P. 313), that as the vessel could be steered, and move ahead through the water, or stop, or go astern, though not as quickly as before the accident to her machinery, she was still under command, for she was not unable to "get out of the way." The exhibition of the three red lights was, therefore, misleading and, together with the absence of the red side light, brought about the disaster. THE P. CALAND [C. A. 191

7. —— *Thames Rules, r.* 20—*Stock Awash.*] By r. 20 of the rules and by-laws for the regulation of the navigation of the river Thames, allowed by Order in Council, February 5, 1872, "No vessel shall be navigated or lie in the river with its anchor or anchors hanging by the cable perpendicularly from the hawse unless the stock shall be awash . . . ."—In an action of damage for a collision which occurred in the river Thames, it appeared that the anchor of the plaintiffs' vessel was one of the parts which first came in contact with the defendants' vessel. It was hanging from the hawse, shackle, or ring, awash, and the defendants by their counter-claim charged the plaintiffs with neglecting to comply with the rule:—*Held*, that the rule had not been infringed, as the anchor must be as low as stock awash, but may be as much lower as is thought proper. THE J. R. HINDE - - - - - 231

COLLISION—*continued.*

8. —— *Damage to Ship—Negligence of Dock Official—County Court—Jurisdiction—The County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *s.* 3—*The County Courts Admiralty Jurisdiction Amendment Act*, 1869 (32 & 33 *Vict. c.* 51), *s.* 4—*Costs.*] By the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 3: "Any county court having Admiralty jurisdiction shall have jurisdiction . . . . to try . . . . the following causes . . . . (3) as to any claim for damage . . . . by collision . . . . in which the amount claimed does not exceed three hundred pounds."—By the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), s. 4: "The third section of the County Courts Admiralty Jurisdiction Act, 1868, shall extend and apply to all claims for damage to ships whether by collision or otherwise, when the amount claimed does not exceed three hundred pounds."—The plaintiffs brought an action, in personam, in the Probate, Divorce, and Admiralty Division (Admiralty) of the High Court of Justice, against a dock company for injuries, to the amount of 221*l.* 4*s.* 6*d.*, to their steamship, by a collision with the dock wall, occasioned by the negligence of the servants of the dock company. The Court found the dock company liable, but the President refused the plaintiffs their costs on the ground that the action ought to have been brought in the county court exercising Admiralty jurisdiction where the cause of action arose.—On appeal against the disallowance of the costs:—*Held*, by the majority of the Court of Appeal (Lord Esher, M.R., and Lopes, L.J.)—reversing the decision of the President, [1891] P. 216—that the costs could not be disallowed on that ground, as neither the Admiralty Court, nor the Admiralty side of a county court, had jurisdiction to entertain such an action, which could only have been tried by a judge of the Probate, Divorce, and Admiralty Division, sitting as a judge of the High Court:—*Held*, by Fry, L.J., that the costs were properly disallowed, as the Admiralty Court had jurisdiction, and the combined effect of s. 3 of the Act of 1868, and s. 4 of the Act of 1869 was to give the county court similar jurisdiction, but limited in amount. TURNER *v.* MERSEY DOCKS AND HARBOUR BOARD. THE ZETA - C. A. 285

9. —— *Practice—Amount recovered under* 300*l.*—*Costs*—*The County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71) *s.* 3, *sub-s.* 3, *and s.* 9.] In an action of damage by collision, the hearing lasted five hours, and the decision mainly turned on the inability of the defendants to exonerate their steamship from the charge of not keeping out of the way of the plaintiffs' steamer, a large vessel in tow of tugs, and which the defendants' steamer was overtaking in the river Thames. In the result the defendants' vessel was held alone to blame, and the damages were referred in the usual way to the registrar and merchants.—The plaintiffs filed their particulars of claim amounting to 339*l.* 15*s.* 7*d.*, but the reference was not proceeded with as the parties agreed the damages at 226*l.* 5*s.*—On motion on behalf of the plaintiffs, to condemn the defendants and their bail in that amount, with interest, and in the costs of the

COLLISION—*continued.*

action, the defendants contended that the plaintiffs were not entitled to their costs, as the amount recovered was under the statutory county court limit of 300*l.*, and, therefore, the action ought to have been brought in a county court:—*Held*, that the plaintiffs were entitled to their costs, for the discretion of the Court in allowing, or refusing, costs now depends upon whether, considering the facts and the circumstances of the particular case, the plaintiffs have acted properly and reasonably in bringing their action in the High Court, and—considering the size of the vessels, the nature of the collision, the length of time the hearing lasted, and the judgment pronounced—this case was a proper one to be tried in the High Court. THE SALTBURN - 333

10. —— *Barge sunk whilst moored in a Dock —Absence of Man in Charge—No presumption of Negligence in Owner of Barge.*] Between 6 and 7 o'clock on an October evening, the man in charge of a laden barge left her moored in a dock lighted by the electric light.—Between 7 and 8 P.M., a steam tug, used in shifting craft in the dock, ran into her, and when the man returned at 9 P.M. he found the barge sunk.—In an action of damage by collision, brought, in the City of London Court, by the owners of the barge, against the owners of the tug:—*Held*, that, in law, there was no duty on the owner of a barge to have a man on board of her when moored in a dock, and that, on the facts, the tug must be pronounced alone to blame.—On appeal, on the ground (inter alia) that there was contributory negligence on the part of the owners of the barge in leaving her without any one in charge of her, who might have averted the collision, or beached the barge afterwards:—*Held*, by the Divisional Court, that the appeal must be dismissed, for the absence of a person on the barge had nothing to do with the collision, and it would have been impracticable to have beached the barge afterwards.—*The Scotia* (6 Asp. M. L. C. 541), and *The Dunstanborough* ([1892] P. 363) distinguished. THE HORNET - - - - - - 361

11. —— *Limitation of Liability—Wrong Manœuvre not Corrected—Damage "Arising on Distinct Occasions"—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 506—*Merchant Shipping Act Amendment Act*, 1862 (25 & 26 *Vict. c.* 63), *s.* 54—*Inevitable Accident.*] By reason of the improper navigation of the steamship *Schwan*, in starboarding across the bows of the steamship *Albano*, the latter vessel sustained damage by coming into collision with the *M.* at anchor, and, by reason of the *Schwan* continuing under a starboard helm, that vessel came into collision with, and sank, the *D.* at anchor.—In an action by the owners of the *D.* against the *Schwan*, the latter vessel was found to blame. Her owners thereupon instituted a limitation suit, and obtained a decree under s. 54 of the Merchant Shipping Act Amendment Act, 1862, limiting their liability to 8*l.* per ton for damage caused by the improper navigation of the *Schwan* on the occasion of the collision between that vessel and the *D.*—In an action, by the owners of the *M.*, against the *Albano*, it was held by the Court of Appeal that the collision was an inevitable accident. By Lord

COLLISION—*continued.*

Esher, M.R., because it had been shewn that, owing to the wrongful starboarding of the *Schwan*, something happened over which those in charge of the *Albano* had no control, and the effect of which could not be avoided by the "greatest" care and skill. By Fry and Lopes, L.JJ., because the accident, being one which those in charge of the *Albano* could not possibly prevent by the exercise of "ordinary" care, caution, and maritime skill, it was inevitable within the definition in *The Marpesia* (Law Rep. 4 P. C. 212).—In an action by the owners of the *Albano* against the *Schwan* for the damage caused by the collision between the *Albano* and the *M.*, the owners of the *Schwan* (in consequence of the above decision of the Court of Appeal) admitted that the damage was caused by the improper navigation of the *Schwan*, but contended that the action was barred, as there was only one act of improper navigation, viz., the original starboarding, and no damage "arising on distinct occasions" within the meaning of s. 506 of the Merchant Shipping Act, 1854, so that the owners of the *Albano* must come in and claim against the fund paid into Court under the decree limiting their liability, or, in the alternative, that, if there were two acts of improper navigation, then the owners of the *Schwan* were exempt from liability, on the ground that the second act of improper navigation—viz., continuing under a starboard helm—was solely the fault of the pilot who was in charge by compulsion of law:—*Held*, by the Court of Appeal—affirming the decision of the President—that (1.) the onus was upon the owners of the *Schwan* to shew that it was the same act of improper navigation, but there was time and opportunity to correct the wrongful starboarding, and, by the use of ordinary care and skill, to avoid the collision with the *D.* Therefore, the damage to the *D.* caused by the *Schwan* continuing under a starboard helm, arose on a "distinct occasion" from the act of improper navigation on the part of the *Schwan* in starboarding across the bows of the *Albano*; and (2.) that the burden of proof was upon the *Schwan* to shew that the fault was that of the pilot alone; but the evidence established that, from want of efficient look-out, the pilot was not warned in time to enable him, by correcting the wrongful starboarding, to avoid the collision with the *D.* Therefore, the owners of the *Schwan* were liable for the damage sued for, by the owners of the *Albano*, to the same extent as if no other damage had arisen. THE SCHWAN. THE ALBANO [C. A. 419

COSTS—Counter-claim—Salvage - - 58
See SALVAGE.

—— Higher scale—Admiralty - - 95
See PRACTICE. 2.

—— Collision — Practice — Amount recovered under 300*l.* - - - 333
See COLLISION. 9.

COUNTER-CLAIM — Salvage — Negligence of Salvors—Collision - - - 58
See SALVAGE.

COUNTY COURT—Appeal—Amount decreed due under 50*l.* - - - - 67
See PRACTICE.

COUNTY COURT—*continued.*

—— Jurisdiction—Admiralty—Ship—Damage Negligence of dock official - 285
See COLLISION. 8.

DEMURRAGE—Charterparty—Steamer to be discharged as fast as she can deliver
See CHARTERPARTY. [351

EVIDENCE—Negligence—Vessel at anchor—Inevitable accident—Steam steering gear—Latent defect—Reasonable care and skill—Burden of proof—Practice
See COLLISION. ¶ 2. [179

—— Charterparty—Construction - - 411
See CHARTERPARTY. 2.

INEVITABLE ACCIDENT—Collision—Reasonable care and skill—Burden of proof 9,
See COLLISION. 1, 11 [419

JURISDICTION—County court—Admiralty—Ship—Damage—Negligence of dock official - - - - 285
See COLLISION. 8.

LIMITATION OF LIABILITY—*Gross Tonnage—Double Bottom for Water Ballast—The Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 21, *sub-s.* 2—*The Merchant Shipping* (*Tonnage*) *Act*, 1889 (52 & 53 *Vict. c.* 43), *s.* 5.] In an action for limitation of liability, the owner of a ship, which is constructed with a double bottom for water ballast, is entitled—in calculating the gross tonnage upon which his statutory liability in damages is based—to avail himself of the provisions of s. 5 of the Merchant Shipping (Tonnage) Act, 1889, and measure to the upper side of the inner plating of the double bottom, so as to exclude the space between the inner and outer plating. THE ZANZIBAR - - - - 233

—— Wrong manœuvre not corrected—Damages arising on distinct occasions - 419
See COLLISION. 11.

MISCONDUCT—Salvors—Forfeiture of reward
See SALVAGE. 3. [70

NEGLIGENCE—Presumption—Barge sunk whilst moored in a dock—Absence of man in charge - - - 361
See COLLISION. 10.

PARTIES—Adding or substituting a plaintiff after decree - - - - 201
See PRACTICE. 3.

PILOTAGE—Compulsory—Draught of water
See COLLISION. 4. [132

PRACTICE—*Appeal from County Court—Amount decreed due under* 50*l.*—*County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *s.* 31—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 120.] By s. 31 of the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), "No appeal shall be allowed unless the amount decreed or ordered to be due exceeds the sum of fifty pounds."—By s. 120 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), the party aggrieved by the judgment, direction, decision, or order of a county court judge in point of law or equity may appeal to the High Court.—In an Admiralty action for breach of charterparty brought in a county court by the plaintiffs, the owners of a steamship, against the defendants, the charterers' agents, the county court judge made a decree in favour of the plaintiffs for nominal damages, to wit, 1*s.* and costs.—The plaintiffs appealed to a Divisional Court of the Admiralty Division of the High Court.—On objection being taken by the defendants that there was no appeal, as the amount decreed did not exceed the sum named in s. 31 of the County Courts Admiralty Jurisdiction Act, 1868:—*Held*, by the Divisional Court, that the appeal could be heard, as the language of s. 120 of the County Courts Act, 1888, was general in its terms, and therefore included an appeal from a final judgment of a county court judge in an Admiralty action. THE EDEN - - 67

2. —— *Costs—Higher Scale—Rules of the Supreme Court, Order* LXV., *r.* 9—*Scientific Evidence—Plans.*] By Order LXV., r. 9, of the Rules of the Supreme Court, 1883, "The fees set forth in the column headed 'higher scale' in Appendix N may be allowed . . . . in any cause or matter . . . . if, on special grounds arising out of the nature and importance or the difficulty . . . . of the case, the Court . . . . shall at the trial or hearing . . . . so order. . . ."—The plaintiffs, owners of a steamship, brought an action in the Admiralty Division of the High Court, claiming damages against the defendants, a port and harbour authority, for injuries sustained by the vessel owing to the alleged negligence of the servants of the defendants in not keeping the bed of the harbour in a proper and fit state for the vessel to ground upon at low water.—The defendants by their defence alleged (inter alia) that the damage was occasioned by the inherent weakness and unfitness of the vessel to take the ground with the cargo she had on board.—The trial of the action lasted the greater part of four days, and, owing to the nature of the defence set up, several engineers and surveyors were called on both sides, who produced plans in support of their respective views as to the strength and construction of the vessel.—Judgment was given for the plaintiffs on the ground that the damage sustained by the vessel was due to a ridge of gravel left in the bed of the harbour by the negligence of the servants of the defendants.—On the question of costs:—*Held*, that the plaintiffs were entitled to an order for costs on the higher scale inasmuch as the case was special in its nature, involving the calling of a number of scientific witnesses, the preparation of plans, and had been so presented as greatly to facilitate its trial. THE ROBIN - - - - 95

3. —— *Parties—Adding or Substituting a Plaintiff after Decree—Rules of Supreme Court, Order* XVI., *rr.* 2, 11, 12—*Finality of Judgment.*] By Order XVI., r. 2, of the rules of the Supreme Court: "Where an action had been commenced in the name of the wrong person as plaintiff. . . . the Court or a judge may, if satisfied that it has been so commenced through a bonâ fide mistake,

PRACTICE—*continued.*
and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted . . . as plaintiff upon such terms as may be just." By r. 11: ". . . The Court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a judge to be just, order that the names of any parties improperly joined . . . as plaintiffs . . . be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. No person shall be added as a plaintiff . . . . without his own consent in writing . . . "—In an action in personam for damage by collision, the name of the agent, instead of that of the owner of the cargo on board the plaintiff's vessel, was, by a bonâ fide mistake, inserted in the writ as a co-plaintiff.—The case was carried up to the House of Lords, with the result that the defendants' vessel was found alone to blame, and a decree made in favour of the plaintiffs. The mistake was then discovered, and, to enable the claim of the cargo-owner for damages to be assessed by the registrar and merchants, Jeune, J., made an order that, on payment of the costs of the application, the name of the owner of the cargo should be substituted for that of the agent as a plaintiff:—*Held*, by the Court of Appeal, that a decree in an Admiralty action, fixing the liability, but leaving the damages to be assessed, is not final, and therefore there was power under Order XVI., rr. 2, 11, to make the order, which was affirmed, with the variation that the written consent of the cargo-owner to be added as a plaintiff must be obtained within a limited period. THE DUKE OF BUCCLEUCH - - C. A. 201

—— Action in rem—Amendment of Indorsement of writ - - - - 64
See SALVAGE. 2.

—— Amendment of indorsement of writ—Costs
See SALVAGE. 2. [64

—— Salvage—Agreement to endeavour to tow—Payment for work done—Derelict—Costs - - - - - 122
See SALVAGE. 4.

—— Action in rem—Appearance of owners of res—Award in excess of undertaking to put in bail—Personal liability of owners of res - - - - 304
See SALVAGE. 5.

—— Costs—Collision—Amount recovered under 300*l.* - - - - - 333
See COLLISION. 9.

RULES:—
—— **ORDER XVI., rr. 2, 11, 12** - - 201
See PRACTICE. 3.

—— **ORDER LXV., r. 9** - - - 95
See PRACTICE. 2.

SAILING RULES—Collision - - 105
See COLLISION. 3.

—— "Not under command" - - 191
See COLLISION. 6.

SALVAGE—*Counter-claim for Negligence of Salvors—Collision — Diminution of Award—Costs.*] In an action of salvage, the owners of the salved vessel in their defence admitted that some salvage services had been rendered, but counter-claimed for injuries sustained by their vessel, through a collision caused by the alleged negligent and bad navigation of the salving vessel, and they asked, not for forfeiture of the reward, but for an allowance in account, the amount of the damages to be ascertained by a reference to the registrar and merchants. At the hearing of the action it was stated by the defendants that the amount of the damage was about 400*l.*:—*Held*, that such want of skill in manœuvring the salving vessel had been proved as went to diminish the award of salvage, and the Court deducted 400*l.* damages from the sum of 800*l.* intended to have been given to the salvors, and made an award of 400*l.* with costs. THE DWINA - - - - 58

2. —— *Salvage—Action in rem—Practice—Amendment of Indorsement of Writ—Costs.*] In an action in rem for salvage services rendered to a ship, her cargo, and freight, the plaintiffs indorsed the writ with a claim for 5000*l.* and the owners of the ship, cargo, and freight gave an undertaking through their solicitor to put in bail for that amount.—The statement of claim, subsequently delivered, concluded with a claim in the usual form for "such an amount of salvage as to the Court may seem just."—At the hearing of the action, the Court made an award of 7500*l.* Thereupon, the plaintiffs, before the decree was drawn up, moved for leave to amend the indorsement of the writ by altering the sum named therein to 8500*l.*:—*Held*, that the Court had power after judgment to give the required leave, and the Court ordered the indorsement of the writ to be amended by altering the amount named therein to 8500*l.*, the plaintiffs paying the costs of the motion. THE DICTATOR - 64

3. —— *Salvage—Misconduct of Salvors—Forfeiture of Reward.*] A vessel drove ashore in a gale of wind. Part of the crew landed in their own boat, whilst the remainder were taken off by the lifeboat stationed at that part of the coast, for which service the crew of the lifeboat (the plaintiffs) were remunerated in the usual way. On landing, the master of the vessel went off in search of tugs, leaving the officer of the coastguard, with the mate and crew of the vessel to watch her. As nothing could then be done, the mate and crew went to an inn for food and to dry their clothes. After some hours the weather moderated, and the plaintiffs, in spite of the remonstrance of the officer of the coastguard, put off in a boat to the vessel, at the same time forcibly preventing the mate and two of the crew from going in the boat with them. On reaching the vessel, the plaintiffs took possession of her, as if salvors of a derelict, and when the tide ebbed, leaving the vessel high and dry, they laid two anchors out on the sands, by means of which, as the tide rose they turned the vessel's head seaward.—The master of the vessel subsequently

SALVAGE—*continued.*

arrived with tugs; but on rowing to his vessel and attempting to haul himself up the side, he fell back into the boat as one of the plaintiffs let go the rope.—The tugs then got hold of the vessel and towed her towards a neighbouring port; but, through the incapacity of the plaintiffs, she took the ground and had to be towed to sea again. A pilot subsequently boarded her; but, owing to the inefficiency of the plaintiffs in carrying out his orders, considerable delay occurred before the vessel was ultimately brought into a place of safety.—In an action of salvage against the owners of the vessel:—*Held*, that the suit must be dismissed with costs, as the vessel was not derelict, and the misconduct of the plaintiffs was such as to work a total forfeiture of salvage reward. THE CAPELLA - - - 70

4. —— *Agreement to endeavour to Tow—Payment for Work done—Derelict—Practice—Costs.*] A steam trawler made an agreement with a disabled barque to tow her for a given sum to a named port. During the towage the weather became rapidly bad, and the foremast of the barque falling overboard, the wreckage increased the difficulty. Thereupon the master of the steam trawler declined to be bound by the agreed sum; but it was arranged that he should endeavour to tow, and do the best he could, at a remuneration to be settled on shore. The steam trawler proved of insufficient power to tow effectually, and, on the rope breaking, the barque was nearly ashore. The trawler, however, made a successful effort to get hold of her again, and towed her out of immediate danger; but, being short of coal, subsequently left the barque in a more dangerous position than when she picked her up, though with a second set of salvors in attendance who ultimately towed the barque into port.—In an action of salvage against the owners of the barque:—*Held*, that the steam trawler was not entitled to salvage, she having conferred no actual benefit on the salved property; but (following *The Benlarig*, 14 P. D. 3) that she was entitled to some payment for work done under the agreement to endeavour to tow.—The second set of salvors consisted of two steam trawlers, on board of one of which the crew of the barque went, and there remained throughout the towage by the two trawlers, who, between them, made up a salvage crew to pump and steer the barque whilst towing her to a port of safety.—The second set of salvors, by their counsel, claimed salvage remuneration on the high scale usual where the vessel is a derelict:—*Held*, that as the crew of the barque were on board her at the time the salvage services commenced, and remained by her throughout the salvage operations, the barque could not, for the purpose of fixing the amount of the salvage reward, be treated as abandoned. THE LEPANTO - - - 122

5. —— *Action in rem—Appearance of Owners of res—Award in excess of undertaking to put in Bail—Personal Liability of Owners of res.*] In an action in rem for salvage services, the writ was directed in the usual form "to the owners and parties interested" in the res, and indorsed with a claim for 5000*l.*—As the owners of the salved ship, her cargo, and freight appeared as

SALVAGE—*continued.*

defendants, and through their solicitor gave an undertaking to put in bail for the above amount, the plaintiffs did not arrest the vessel, or interfere with the discharge of the cargo.—The value of the salved ship, her cargo, and freight was 179,200*l.*, and at the hearing the Court made an award of 7500*l.*—The plaintiffs subsequently obtained leave to amend the indorsement on the writ by altering the sum named therein to 8500*l.* (*The Dictator*, [1892] P. 64).—The amount of the award was affirmed on appeal, and the defendants paid the costs, but denied their liability in respect of the amount awarded beyond the amount of the undertaking to put in bail, viz., 5000*l.*—The plaintiffs thereupon moved for leave to proceed personally for the full amount awarded:—*Held*, that the remedy was not limited by the amount of the undertaking to put in bail, and that the plaintiffs were entitled, in the present action, to sue out writs of fieri facias, in order to enforce payment, from the defendants personally, of the full amount of the decree. THE DICTATOR 304

6. —— *Apportionment—The Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 182—*The Merchant Shipping Act Amendment Act*, 1862 (25 & 26 *Vict. c.* 63), *s.* 18—*The Merchant Shipping* (*Fishing Boats*) *Act*, 1883 (46 & 47 *Vict. c.* 41), *s.* 13 — *Agreement to accept Percentage of Salvage.*] By the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 182, " . . . every stipulation by which any seaman consents to abandon . . . any right which he may have or obtain in the nature of salvage, shall be wholly inoperative."—By the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), s. 18, the 182nd section of the Act of 1854 "does not apply to the case of any stipulation made by the seamen belonging to any ship, which, according to the terms of the agreement, is to be employed on salvage service, with respect to the remuneration to be paid to them for salvage services to be rendered by such ship to any other ship or ships."—By the Merchant Shipping (Fishing Boats) Act, 1883 (46 & 47 Vict. c. 41), s. 13: "The skipper of every fishing boat shall enter into an agreement with every seaman . . . whom he carries to sea from any port in the United Kingdom as one of his crew, and every such agreement shall be in a form sanctioned by the Board of Trade, . . . and shall contain the following particulars . . . (5) the remuneration which each seaman is to receive, whether in wages or by a share in the catch, or in both ways . . . and every such agreement shall be so framed as to admit of stipulations, to be adopted at the will of the skipper and seaman in each case, as to advance and allotment of wages, and may contain any other stipulations which are not contrary to law."—By articles of agreement in the form sanctioned by the Board of Trade under the above Act, " . . . every member of the crew, including apprentices, shall be regarded as entitled to participate in any sum or sums of money arising from any salvage or salvage services performed for any ship in distress or otherwise in the proportion set forth opposite to their respective names in this agreement."—Salvage services were rendered in the North Sea to a sailing

SALVAGE—*continued.*

vessel by several steam trawlers, and, in actions consolidated for the purpose of trials, awards were made to each of them.—The owners, master, and crew of one of these trawlers were awarded the sum of 1000*l.*, and, in accordance with the articles of agreement, the master, mate, and boatswain were entitled respectively to a share of salvage of 10, 7, and 3 per cent.—On motion on behalf of the master, mate, and boatswain, for such an apportionment, as to the Court should seem just, of the 1000*l.* less unrecovered costs, and for a declaration that the applicants were not bound by the articles to receive only the proportions of salvage set out therein against their respective names:—*Held*, that, as s. 182 of the Act of 1854 did not prevent seamen entering into an equitable arrangement for the apportionment of salvage, therefore, though the trawler in question was not within s. 18 of the amending Act of 1862, the apportionment of salvage contemplated by the articles was not contrary to law, and being, in the opinion of the Court, equitable, was binding.—The master and mate were paid wages on the footing of a share of the fishing profits, but the boatswain received so much per week; and the owners of the trawler, in arriving at the nett sum to be apportioned, claimed to deduct the cost of repairs for damage sustained by the vessel in rendering the salvage services, and as against the boatswain, certain other sums for loss of profits, time, &c.:—*Held*, that these deductions could not be allowed, as the agreement for a certain share of the salvage meant a share of the sum awarded, less any unrecovered costs in obtaining the award.—*Semble*, the provisions of s. 182 of the Merchandise Shipping Act, 1854, and of s. 18 of the amending Act of 1862, do not apply to a master. THE WILHELM TELL - - - - - - - 337

7. —— *Services rendered by Agent—Authority to incur Expenses—Principle upon which Award based.*] An agent is not precluded from claiming as a salvor; but where the owners of the property in danger have requested him to render assistance, and thereby have given him a right to some remuneration though the operations prove unsuccessful, the assessment of the award, for successful salvage services, will be based upon the principle that the agent did not, like an independent salvor, run the risk of the loss of the entire expenditure if his efforts had proved unsuccessful. THE KATE B. JONES - 366

SEAMAN—Wages—Deductions—Disrating by Master - - - - - 76
See WAGES.

STATUTES:—

17 & 18 Vict. c. 104, s. 21, sub-s. 2 - 233
See LIMITATION OF LIABILITY.

—— —— s. 171 - - - - 76
See WAGES.

—— —— s. 182 - - - - 337
See SALVAGE. 6.

—— —— s. 506 - - - - 419
See COLLISION. 11.

25 & 26 Vict. c. 63, s. 18 - - - 337
See SALVAGE. 6.

—— —— s. 54 - - - - 419
See COLLISION. 11.

STATUTES—*continued*

31 & 32 Vict. c. 71, s. 3 - - - 285
See COLLISION. 8.

—— —— s. 3, sub-s. 3, s. 9 - - 333
See COLLISION. 9.

—— —— s. 31 - - - - 67
See PRACTICE.

32 & 33 Vict. c. 51, s. 4 - - - 285
See COLLISION. 8.

46 & 47 Vict. c. 41, s. 13 - - - 337
See SALVAGE. 6.

51 & 52 Vict. c. 43, s. 120 - - - 67
See PRACTICE.

52 & 53 Vict. c. 43, s. 5 - - - 233
See LIMITATION OF LIABILITY.

THAMES RULES—Collision—Stock awash 231
See COLLISION. 7.

TONNAGE—Limitation of Liability—Gross tonnage—Double bottom for water ballast
See LIMITATION OF LIABILITY. [233

WAGES—*Seaman—Disrating by Master—Deductions—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 171.] By s. 171 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), "every master shall . . . . before paying off or discharging any seaman, deliver to him . . . . a full and true account, in a form sanctioned by the Board of Trade, of his wages and of all deductions to be made therefrom on any account whatever . . . . and no deduction from the wages of any seaman . . . . shall be allowed unless it is included in the account so delivered. . . ."—The plaintiff signed articles to serve on board the defendant's vessel as refrigerating engineer at 10*l.* per month. He so served for two months, at the end of which time the master of the vessel, on account of alleged drunkenness and unfitness, disrated him, and placed him in the main engine room, at wages reduced to 7*l.* per month for the remaining period of one month and eighteen days during which the voyage lasted.—In the account of wages on the Board of Trade form, the master filled in the date when the wages began, the date when they ceased, the total period of employment, and in the column headed "Earnings," entered, "Wages at 10 and 7 per month—two months at 10*l.*—20*l.*," and then filled in the final balance less cash advances.—In an action for wages, brought by the plaintiff against the defendants in the Liverpool Court of Passage, the defence raised of justification for the disrating on account of drunkenness and unfitness was not gone into, but judgment was entered for the plaintiff on the ground that the account delivered by the defendants was insufficient, as there was no entry in the column headed "deductions" of the amount of wages forfeited by reason of the reduction consequent on disrating:—*Held*, by the Divisional Court, that the case must be sent back to be retried, as the reduction in the amount of wages consequent on disrating was not a "deduction" requiring to be entered under that column in the Board of Trade form.—*Per* Jeune, J. The matters coming

WAGES—*continued.*

under the head of "forfeitures" in the column of deductions in the Board of Trade form are such offences as are enumerated in s. 243 of the Merchant Shipping Act, 1854, and the word "deductions" refers to matters of such kind as sums deducted for families under s. 192, or for medical attendance under s. 228, sub-s. (4).—*Semble*, the master has the power, and is the proper person, if circumstances require it, to disrate. THE HIGHLAND CHIEF - - - - - - 76

WORDS:—

"Arising on distinct occasions" - - 419
See COLLISION, 11.

"Inevitable accident" - - - 419
See COLLISION. 11.

"Not under command" - - - 191
See COLLISION. 6.

"Steamer to be discharged as fast as she can be delivered" - - - 351
See CHARTERPARTY.

LONDON:
PRINTED BY WILLIAM CLOWES AND SONS, LIMITED,
STAMFORD STREET AND CHARING CROSS.

IUL 2 8 APR 1978